



Courtside *Newsletter*

Real Estate Teams & the Quandary of the Independent Contractor Status



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The status of a real estate agent as an independent contractor has always been prone to controversy. Currently, there are questions surrounding the independent contractor status, and how it is affected by real estate teams.

Background

According to the IRS, “[t]he general rule is that an individual is an independent contractor if the payer has the right to control or direct only the result of the work and not what will be done and how it will be done.” Due to the nature of their jobs, real estate agents enjoy a certain autonomy that generally places them as independent contractors, even though they must be supervised by a broker.

The IRS created a special category for real estate agents as statutory non-employees. Per IRC § 3508, real estate agents are considered statutory nonemployees if:

- They are a licensed real estate agent;
- All payments for their services are related to their sales or other output (rather than number of hours worked); and,
- There is a written contract stating they will not be treated as employees for federal tax purposes. (The California Association of REALTORS® has created the Independent Contractor Agreement (ICA) form to satisfy this requirement.)

Additionally, under California Labor Law an independent contractor can be any person who renders service for a specified result, under the control of a principal only as to the result of the work. The principal has no control by which such result is accomplished. The issuance of a 1099 or independent contractor agreement does not, in itself, create an independent contractor relationship.

Historically, the most important factor considered by California courts and administrative agencies involved the independent contractor’s right to control the manner and means of accomplishing the result desired. The courts use a multifactor balancing test to determine the answer, yet no one factor is decisive. Generally, the more control a principal has over the manner and means used by the alleged independent contractor is the most important factor.

The Team Issue

Real estate teams have long been both lauded and lamented by those in the industry. Whichever side of the fence you choose, there is no doubt that they have been rising in popularity. With that popularity comes the exposure of certain legal issues, such as the question of independent contractor status, and how it works within teams. This is something both agents and supervising brokers should be aware of.

On most teams, there is someone who is considered a “team leader,” or the individual who controls and dictates what the rest of the team does with leads or listings. This poses issues with both employment law and a broker’s statutory duty to supervise his or her agents. Team leaders have no requirement to supervise the actions of the agents working under them. However, lack of supervision could open-up both the agents and broker to liability. Additionally, a Team Leader’s act of directing other agents could potentially be seen as treating them as employees rather than independent contractors. The more control a Team Leader exerts over the agents with the team, the greater the liability becomes. Teams, and their supervising brokers, need to be sure that the agents under them are acting in the capacity of independent contractors at all times. Otherwise, they will need to renegotiate their contracts to hire them as employees.

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Why is this Important?

Recent litigation has brought this issue to the forefront of many brokers' concerns. In *Barasani v. Coldwell Banker*, Barasani brought a class-action lawsuit against Coldwell Banker stating he had been "willfully misclassified" as an independent contractor, when he should have been classified as an employee. The matter settled before going to trial, thus no California case precedence was set. However, Coldwell Banker will nonetheless be paying out \$4.5 million to real estate agents and associates in California under the terms of the settlement.

Misclassification of a real estate agent could result in significant financial blow to a broker. Should the court determine that a real estate agent was misclassified as an independent contractor, he or she may be entitled to employee benefits. According to California Labor Code Section 226.8(b), if the court or administrative agencies determines that a broker has misclassified a real estate agent as an independent contractor, that broker may be subjected to civil penalties greater than \$5,000, in addition to other penalties and fines. The real estate agent who was misclassified may be entitled to reimbursement of business expenditures, taxes, workers' compensation, wait time penalties, meal/rest break penalties, overtime pay and/or vacation pay.

Ultimately, maintaining independent contractor status is key for brokers to avoid liability under the law. The line between independent contractor and employee is very fine, thus supervision and education of team leaders are important steps for brokers to take in order to stay within the bounds of the contracts they enter into with their agents.

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Calendar**Brown Bag (Two Sessions!)**

Date: February 2, 2018

Time: 10:00 a.m. – 11:30 a.m. &
12:30 p.m. – 2:00 p.m.

Location: Pacific West Association of REALTORS®
Contact PWR for more info!

www.pwr.net

RPA

Date: February 27, 2018

Time: 9:00 a.m. – 4:30 p.m.

Location: Pacific West Association of REALTORS® -
Anaheim

Contact PWR for more info!

www.pwr.net

RPA with Forms

Date: March 6, 2018

Time: 9:00 a.m. – 4:30 p.m.

Location: Tri-Counties Association of REALTORS® -
Contact Tri-Co for more info!

www.tricorealtors.com

Broker Supervision

Date: March 12, 2018

Time: 9:00 a.m. – 1:00 p.m.

Location: Pacific West Association of REALTORS® -
Anaheim

Contact PWR for more info!

www.pwr.net

Brown Bag (Two Sessions!)

Date: March 13, 2018

Time: 10:00 a.m. – 11:30 a.m. &
12:30 p.m. – 2:00 p.m.

Location: Pacific West Association of REALTORS®
Contact PWR for more info!

www.pwr.net

Property Management

Date: March 20, 2018

Time: 9:00 a.m. – 1:00 p.m.

Location: Pacific West Association of REALTORS® -
Anaheim

Contact PWR for more info!

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