

Are Agents Independent Contractors or Employees?

U.S. Department of Labor's New Regulations: Effective March 11, 2024

Under California law, as clarified in 2020 in Assembly Bill 5, a real estate licensee is an independent contractor if:

- The individual has a real estate license
- Compensation is based on output rather than hours worked and
- A written contract between the individual licensee and broker provides the individual will not be treated as an employee for real estate services rendered.

However, now, the individual's status is less clear because the US Department of Labor has issued new regulations under the Federal Labor Standards Act.

When do the Department of Labor's new regulations go into effect?

March 11, 2024.

How does the federal law differ from California Law?

The California law makes it clear that real estate agents can be classified as independent contractors with a simple three-part test (see first paragraph). The new federal regulations use the older "totality-of-the-circumstances" test to determine whether an agent is an employee or independent contractor.

What is the federal new rule?

The "totality-of-the-circumstances" test relies on six key factors designed to ferret out the "economic realities" of the job. If the factors show that the worker is economically dependent on the potential employer for work, then the worker is an employee. But if the factors show that the worker is in business for themselves, then the worker is an independent contractor. All factors are considered, and there is not one factor that is more controlling than another.

What are the six factors?

- 1) Opportunity for profit or loss depending on managerial skill;
- 2) Investments by the worker and the potential employer;
- 3) Degree of permanence of the work relationship;
- 4) Nature and degree of control;

5) Extent to which the work performed is an integral part of the potential employer's business; and

6) Skill and initiative.

Is there specific guidance in the new regulation that relates to the real estate industry?

No. While the DOL stated each specific industry is "highly relevant" when applying the factors, the Final Rule is general and applies across the board to all industries. Some of the factors conflict with California real estate law such as licensed activities being an integral part of the real estate company (factor 5).

What if there is an independent contractor agreement signed by the broker and the agent?

Due to the six key factors, the existence of an independent contractor agreement alone does not guarantee an agent's independent contractor status.

What is the practical advice for brokers to help ensure that agents are independent contractors?

First and foremost, the work-related provisions in paragraph 3 of C.A.R.'s independent contractor agreement should be adhered to. This will include:

- A broker shall not restrict or dictate the agent's activities with regard to hours, leads, open houses, opportunity or floor time, production, prospects, sales meetings, schedule, inventory, time off, vacation, or similar activities, except to the extent required by law. (Factor 4)
- The agent shall not be required to accept any assignments by the broker to service a particular listing or client. An agent should decide at their sole discretion: whether to take a listing; what clients to work for; their working time and schedule; and what activities related to the services will be provided including when to schedule open houses, meetings, time off, or similar activities. (Factors 4 and 6)
- Agents should pay for all of their own advertising, lead generation, space rental, office supplies, career development, MLS and other fees, etc. Brokers should not impose costs on agents. However, to comply with California law, the broker should be careful to review and approve the advertisements. (Factors 1 and 2)
- An agent should engage in marketing, advertising, and other efforts to expand his/her business, rent their own space, and (to the extent possible) hire others to assist. (Factors 1 and 2)
- Each agent should negotiate what compensation to charge clients, consistent with any parameters as specifically set forth in the terms of the independent contractor agreement. California law requires that all compensation for real estate activity must be paid to a broker, however brokers should remain as flexible as possible in allowing salespersons to determine compensation from each client as the salesperson deems appropriate. However, the broker may, of course, determine how much the broker retains for the broker's services, including whether and how much, if any, compensation is credited against a salesperson's compensation to assure the broker is able to retain any contractually agreed-upon amount. (Factors 1 and 6)

- Brokers may consider limiting the term of their independent contractor agreement to a fixed ending date (such as one or several years), and then renewing it or entering another agreement for a period of time. (Factor 3)

If a broker follows this practical advice, are they assured that their agents will be “independent contractors” under federal law?

No. The new rule uses a “totality-of-the-circumstances” test. Because no one factor or set of factors is controlling, there is still a chance the agent could be deemed an employee. C.A.R. recommends that brokers follow the above advice to put them in the best position of preserving their agents’ independent contractor status.

In California, by law agents may work for and receive payment from only one broker at a time. The broker is additionally required to adopt policies and procedures and supervise their agents. How does this fit into the DOL’s rules?

The DOL rule says that policies adopted for the *sole* purpose of compliance with law are not indicative of control over the worker. However, a broker’s chosen compliance methods might indicate a level of control over the agent.

California law requires a broker to adopt rules to supervise agents, and if they do not, then they may run afoul of DRE regulations. Going beyond what the DRE requires and imposing too many requirements on their agents, may be a factor for making them an “employee” per federal wage and hour law. Brokers may suggest risk management protocols in order to minimize their liability and to comply with real estate and other laws. However, given this new federal rule, brokers should consider consultation with an attorney who specializes in employment law to evaluate whether there are recommended changes for the broker’s procedures.

Where can I find more details about the DOL’s new regulation?

Please see DOL’s [“Frequently Asked Questions - Final Rule: Employee or Independent Contractor Classification Under the FLSA.”](#)