

Independent Contractor Status Under Fire
Triple Play December 8-9, 2015
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I. In today's session you will learn:

- About the current litigation that could force real estate independent contractors to become employees.
- Risks for agents, teams, and brokers plus strategies to mitigate those risks.
- Best practices to protect yourself and your business.

CAVEAT: Consult a LABOR Attorney, not a real estate or general attorney.

II. The Conflict: The real estate statutes require brokers to supervise their agents—the labor laws prohibit employers from supervision of independent contractors.

- Different laws, different treatments mean can be both employee and IC.
- Departments of Labor start with presumption of being an employee.
- Benefits of IC status to agents include work choice, higher potential income, and being your own boss.
- Benefits to employers include no withholding, income tax withholding, unemployment insurance, worker's compensation, minimum wages, health care, and protection from IC's activities if sued.
- What's at stake: \$500 Billion in annual commissions.
- Minimum wage employee (\$8.75); brokerage needs \$43,500 to cover expenses.

III. IC Tests in Each State

- **IC Test in New Jersey** uses the ABC or three factor test (<http://lwd.dol.state.nj.us/labor/ea/empinfo/EmployeeIndependentContractor.html>)
 - Worked must be free from control, work must be outside employer's usual course of business (not on employer's property), and worker is engaged in an independently established trade, occupation, profession, or business.
 - **RE/MAX of NJ v. Wausau Insurance:** Any agreement that thwarts the payment of Worker's Compensation will not be sanctioned. Exposure exists for brokers in the area of worker's compensation.
- **IC Tests in New York: New York State Department of Labor**
<https://labor.ny.gov/formsdocs/ui/ia318.14.pdf>
 - Three factor test: supervision, direction, and control.
 - Key point is the relationship. ICs cannot be required to take training, attend meetings, be prohibited from working for another employer, or terminated their employment on short notice.
 - §441 of the Real Property Law says salespersons must be supervised by a licensed real estate broker.
- **IC Tests in Pennsylvania**
 - Two-prong test: like NY, free from supervision, direction, and control, same restrictions on working at employer's premises, and independent business.

IV. First line of attack: litigation over the various IC Tests

- The five factor Economic Reality Test: Degree of control, extent of relative investments for employee by employer, employee's opportunity for profit is contingent on their own work, skill required, plus permanency of relationship.
- Three-factor or ABC test: (Same as NY and PA).
- IRS Eleven Factor test: behavioral control, financial control, plus other controls.
- All real estate lawsuits over IC v. employee status argue misclassification.

V. The Legal Challenges

- Monell v. Boston Pads—misclassification under the MA Three Factor Test.
 - Real estate law was passed later than IC law and therefore took precedence.
 - MA Judicial Supreme Court Ruling in favor of IC model, June 3, 2015. Decision included only one of four issues and left door open to additional litigation.
 - Effect of an unfavorable ruling: attorneys fees, payment of back minimum wages, overtime reimbursement, FICA, penalties and other employee taxes across real estate industry in MA.
- The Redfin Cases: A battle over arbitration: Cruz v. Redfin and Galen v. Redfin
 - Damages sought for unpaid overtime, missed meals, rest periods, untimely wage statements, penalties, and unreimbursed business expenses.
 - Agents had signed individual arbitration provisions requiring them to arbitrate with Redfin and not allowing class action lawsuits.
 - Battle being waged in other industries over who prevails: Feds do.
 - The two suits have been combined and are being heard by the same judge.
 - Implication for brokers—arbitration provisions in your ICA may be powerful deterrent against class action lawsuits.
- The BIG One: Bararsini v. Coldwell Banker for misclassification. CB claimed they had complied with CA Business and Professions Code
 - The bombshell—court would look to the multi-factor (11-factor test) to determine if agents were misclassified.
 - CB had a class action waiver in their ICA contract that Bararsani sought to invalidate. Trial and appellate court denied petition and postponed until trial.
 - Shook the entire industry—CAR predicted half the brokerages would go bankrupt and 2/3 of agents would be forced out of the business.
 - CAR tried to attack issue legislatively. Trial attorneys and organized labor's efforts to block the CAR bill worked. The bill was withdrawn.
 - CAR did add individual arbitration provision to CAR ICA agreements.
 - Coldwell Banker THANK YOU—had agents decide if they wanted in on class action suit or to arbitrate individually with CB. Huge majority chose arbitration, which reduced class size and forced a settlement.

VI. Risks for Agent Led Teams—Are They Violating the Law?

- Agent (other than managing broker) has no right to supervise ICs. ATL can only supervise when the agent is the agent is an employee.

- ***Team models least likely to violate the labor laws:*** Broker, two co-equal partnered agents, assistants are hired and supervised as employees; All team members and assistants are employees; Broker, agent, assistants are hired by the company and broker or employment agency pays them as employees.
- Greatest risk is for the agent team leader who fails to adequately track hours, breaks, and overtime for employee team members.
- Real estate law provides some protection for managing brokers and supervision—***there is no provision for agents to supervise other ICs unless they are also the managing broker.***
- Best practices for teams to minimize risk
 - Check with labor attorney to determine your compliance.
 - Shift to an employee model if IC agent team members have assigned duties, have to work specific times or use specific systems, must follow team leader's instructions.
 - Make sure ATLS follow laws for overtime, breaks, withholding, & benefits.
 - In office assistants with regular hours—must be treated as employees; use ADP or Paychex for withholding and benefits—must track hours, breaks, overtime.
 - ATLS need to switch to “referral” model in terms of managing team members.
 - Elance, oDesk for virtual assistance—MUST HAVE other clients.
 - ATLS may be subject to DOL scrutiny as well as their supervising broker.

VII. Storms Ahead

- “Wage theft” has triggered intervention by the Department of Labor.
- 26 States have joined Misclassification Initiative with grants of over \$10.2 million to detect misclassification.
- The Zip Realty litigation—harbinger of fines DOL can and does assess.
- In 2010, four Zip Realty agents complained to the CA DLSE (Labor Commissioner) that they were at will employees who worked full time for ZipRealty and weren't paid minimum wage and overtime. Trial court found in favor of the agents; Zip settled for \$600,000.
- Even though Zip Realty settled, the Labor Commissioner then sought to recover \$9 million unpaid wages and overtime for all Zip Realty Agents in California. Zip settled for \$5 million plus back FICA, Workmen's Compensation, and other back taxes and penalties.
- The Labor Commissioner's Warning: *If our agency determines that violations go beyond the claims before us, we can and will pursue those cases for all affected employees. We learned of ZipRealty's systemic minimum wage violations during the litigation of these cases in Superior Court.*
- Implications for REALTORS®: Whether you are an a broker or an agent, if you hire an employee to work in your business, you must track hours, pay minimum wage, and provide breaks as provided by law.

VIII. The Biggest Risk: Litigation Outside Real Estate

- In May 2015 alone, 12 misclassification suits filed against big name companies.
- Uber class certification may pose greatest risk for real estate. Judge Chen ruled a primary consideration is that an IC cannot terminate agreement at will. “Bad news for businesses everywhere.”
- ***The lurking menace, CA DOL ruled Uber driver was employee and awarded driver \$4,152. Florida ruled Uber driver was employee who had right to collect unemployment benefits.***
- Colorado, Georgia, Illinois, Pennsylvania, and Texas have issued rulings that Uber drivers are ICs.

IX. Wild Card for Franchisors: Vicarious Liability

- Conflicting decisions: Dominos and McDonald’s
- Franchisors have responded by rewriting their franchise agreements to include only what is required to meet regulatory standards.
- Changing Policies and Procedures Manuals from using “mandatory” training, systems, tools, and procedures to “best practices,” “optional,” or “highly recommended.”

X. Benefits of a Forced Employee Model?

- Consumers?

- Agents?

- Brokers?

- Agent Teams

XI. Three key points

- If you have employees, make sure you are following the exact letter of the law for breaks, tracking hours, and benefits.
- For agents, obtain your broker’s license “just in case.”
- For broker-owners review your documents including your ICA, Policies and Procedures Manual, and other practices with a Labor Attorney.