NAR Issue Summaries

Federal Tax / Independent Contractor

NAR Committee:

Federal Taxation Committee

What is the fundamental issue?

One of the thorniest questions that many employers face is the appropriate classification of their workers as either employees or independent contractors. These classification issues are important because they govern responsibilities for remittingpayroll taxes and also set out the terms for various employee benefits.

Real estate sales agents have a statutory provision (Internal Revenue Code Section 3508) that provides clear directives about how a real estate broker may classify his/her sales agents as independent contractors. The rules have been in place since about 1984. Realtors would oppose any erosion of Section 3508.

I am a real estate professional. What does this mean for my business?

Brokers and sales agents can determine with certainty what their work arrangements are and can thereby ascertain the role of each with respect to payroll taxes and benefits. This certainty significantly reduces the exposure to sizable penalties that can be imposed on other employers who do not comply with the worker classification criteria the IRS has had in place for more than 30 years.

To be classified as an independent contractor, a broker and a sales agent must have a written agreement showing that the sales agent has a valid real estate license, that the sales agent is aware that he/she will be treated as an independent contractor, and that no compensation or remuneration can be based on hours worked, but rather is on a commission basis.

NAR Policy:

NAR would oppose any erosion of the statutory protections in Section 3508.

Opposition Arguments:

We know of no opposition to the statutory protections afforded qualified real estate agents under Section 3508. However, several legislative proposals have been forwarded in recent years that could erode the common law tests and generally make it more difficult for service providers without statutory protection to be treated as independent contractors rather than as employees.

Legislative/Regulatory Status/Outlook

There appear to be no likely imminent changes for section 3508, the provision in the tax law that provides qualified real estate agents (among others) with a statutory classification as independent contractors.

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However, several legislative proposals have been introduced that would change the worker classification rules for service providers who are not covered by section 3508. If and when tax reform is enacted, these changes could be considered.

Federal legislation supported by NAR, H.R. 5419, the "Direct Seller and Real Estate Harmonization Act," was introduced in the 118th Congress that would mirror section 3508 into other laws, such as the Fair Labor Standards Act (FLSA), to provide additional certainty for real estate professionals' classification as independent contractors. New state legislation and new federal rules expanding the definition of employee continue to threaten a worker's ability to be classified as an independent contractor. On January 10, 2024, the U.S. Department of Labor issued its final rule regarding how workers should be classified under the FLSA, and it may result in misclassification issues. Aligning the FLSA with the IRC would ensure professionals in the real estate industry can continue to operate their businesses and support economic growth with legal certainty.

Current Legislation/Regulation (bill number or regulation)

Final Rule: Employee or Independent Contractor Classification Under the Fair Labor Standards Act

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