

INDEPENDENT CONTRACTOR STATUS

I. INTRODUCTION

Legal responsibilities vary greatly depending upon the status of the relationship between a broker and a salesperson. The potential economic consequences are enormous for brokers and salespersons who think they are operating in an independent contractor relationship but are later determined by law to be in an employer/employee relationship. As an example, if salespersons are employees, a REALTOR® broker is responsible for federal and state income tax withholding, social security and Medicare taxes, unemployment taxes and workers' compensation insurance. If the salespersons affiliated with the REALTOR® broker are independent contractors, the responsibility for these items is borne by the salespersons. REALTOR® brokers and salespersons have traditionally sought to maintain an independent contractor status.

REALTORS® who have been in the business for many years remember the continuing litigation and uncertainty surrounding the issue of whether salespersons were employed by a broker or were independent contractors. The situation was extremely difficult inasmuch as common law generally provided that the relationship must be determined on the facts of each case. Almost 20 years ago, MAR, at the direction of its members, sought and obtained legislation that amended the Occupational Code to create a situation in which brokers and salespersons could establish with certainty their independent contractor relationships. The issue continues to flare up now and then, so REALTORS® need to be aware of the history and current law as it relates to the independent contractor analysis.

II. DISCUSSION

A. Occupational Code

In Michigan, the issue came to the forefront in the 1980's in a case involving an automobile accident. In that case, *Caramagno v Tuchel*, 173 Mich App 167 (1989), plaintiff Caramagno was a passenger in a vehicle that was hit by defendant Bryant, a licensed salesperson. Caramagno was seriously injured. At the time of the accident, salesperson Bryant was traveling from the office of his broker to a home that had been listed for sale through Lee Realty. It was undisputed that, at the time of the accident, Bryant was on "official business" for Lee Realty.

Caramagno filed a complaint against Bryant, Lee Realty and others. Lee Realty filed a motion for summary disposition, arguing that Bryant was an independent contractor and, therefore, Lee Realty could not be vicariously liable for Bryant's action. The trial court agreed and granted Lee Realty's motion for summary disposition. Caramagno appealed.

The Court of Appeals framed the issue as follows:

In this case, there is no dispute as to the fact that defendant Bryant is a real estate salesperson who was working for defendant Lee Realty. Thus, the only question, in this matter of first impression, is whether defendant Bryant was a servant or an independent contractor of defendant Lee Realty. If she was an independent contractor, her employer, Lee Realty, is not liable for her torts because, as a general rule, an employer of an independent contractor is not liable for the negligence of the contractor or the contractor's employees.

On appeal, Caramagno claimed that specific provisions of the Occupational Code required reversal of the trial court's grant of summary disposition. Specifically, the Court of Appeals relied on several provisions of the Occupational Code, which referred to salespersons as "employees," including:

Sec. 2510. A real estate salesperson shall not accept from a person other than **the real estate salesperson's employer** a commission or valuable consideration for the performance of an act specified in this article."

The Court of Appeals therefore concluded that Bryant was an **employee** of Lee Realty and that Lee Realty was, therefore, vicariously liable for her alleged negligence.

The Michigan Supreme Court summarily reversed the decision of the Court of Appeals without discussion. After *Caramagno*, MAR, at the direction of its members, sought and obtained an amendment to the Occupational Code acknowledging that a real estate salesperson may be "employed" as an independent contractor. MCL 339.2501 (f). The Occupational Code also was amended to include the following definition of an independent contractor relationship:

"Independent contractor relationship" means a relationship between a real estate broker and an associate broker or real estate salesperson that satisfies both of the following conditions:

- (i) **A written agreement exists** in which the real estate broker does not consider the associate broker or real estate salesperson as an employee for federal and state income tax purposes.

- (ii) Not less than 75% of the annual compensation paid by the real estate broker to the associate broker or real estate salesperson is from commissions from the sale of real estate.

MCL 339.2501(b).

B. Other Relevant Statutes Recognize And Provide for Independent Contractor Relationships Between Salespersons And Brokers

Similar to the Occupational Code, Michigan worker's compensation law excludes real estate salespersons from its purview under certain conditions. Specifically, the Worker's Disability Compensation Act of 1969 was amended in 1985 to provide that:

A person who is licensed as a real estate salesperson or associate real estate broker under article 25 of Act No. 299 of the Public Acts of 1980, being sections 339.2501 to 339.2515 of the Michigan Compiled Laws, shall not be considered an employee for purposes of this act if both of the following conditions have been met:

- (a) Not less than 75% of the remuneration of the salesperson or associate real estate broker is directly related to the volume of sales of real estate and not to the number of hours worked.
- (b) The salesperson or associate real estate broker has a written agreement with the real estate broker who employs the salesperson or associate real estate broker, which states that the salesperson or associate real estate broker, as applicable, is not considered an employee for tax purposes.

MCL 418.119.

Likewise, real estate salespersons are excluded from the term "employment" for purposes of the Michigan Employment Security Act ("MESA"). Specifically, under MESA, the term "employment" shall not include "[s]ervices performed by real estate salespersons, sales

representatives of investment companies, and agents or solicitors of insurance companies who are compensated principally or wholly on a commission basis.” MCL 421.43(h).

Finally, the Internal Revenue Code also excludes real estate salespersons as employees under certain conditions. Specifically, “in the case of services performed as a qualified real estate agent . . . the individual performing such services shall not be treated as an employee” 26 USC § 3508(a)(1). “Qualified real estate agent” is defined as:

. . . any individual who is a sales person if –

- (A) such individual is a licensed real estate agent,
- (B) substantially all of the remuneration (whether or not paid in cash) for the services performed by such individual as a real estate agent is directly related to sales or other output (including the performance of services) rather than to the number of hours worked, and
- (C) the services performed by the individual are performed pursuant to a written contract between such individual and the person for whom the services are performed and such contract provides that the individual will not be treated as an employee with respect to such services for Federal tax purposes.

26 USC § 3508(b)(1).

In sum, these statutory provisions create a “safe harbor” whereby a real estate broker and salesperson can definitively establish an independent contractor relationship.

C. A Written Independent Contractor Agreement is Critical

Simply because a broker and a salesperson label their affiliation as an “independent contractor relationship” does not mean that a court or regulatory agency will not later decide

that the salesperson is actually an employee. In order to avoid this situation, it is absolutely critical that the broker and salesperson enter into a written Independent Contractor Agreement. If the salesperson does not fit within the "safe harbor" for independent contractors, then regardless of what the broker and salesperson call their relationship, the courts of this state will look at "the totality of the circumstances surrounding the employment relationship."

Specifically, a non-inclusive list of the factors a court will look at is as follows:

- 1) The person was required to complete training classes;
- 2) The person was required to attend regularly scheduled meetings with other persons also providing services to the hiring entity;
- 3) The person's work was evaluated by the hiring entity;
- 4) The person was required to maintain certain office hours (even if only for two or three days per week);
- 5) The person was required to perform his or her services in a particular manner or particular sequence;
- 6) The person was required to perform her work during particular hours;
- 7) The person was required to submit reports;
- 8) The person was required to perform his or her work at the location designated by the hiring entity;
- 9) The person received his or her wages at fixed intervals;
- 10) The person was reimbursed for business and travel expenses;

- 11) The person was provided materials/ equipment by the hiring entity for use in performing services;
- 12) The person, while providing services for the hiring entity, was precluded from simultaneously providing services to other entities or persons;
- 13) The person was required to wear certain clothing when providing services;
- 14) The person was provided with a specific desk and/or work area at the hiring entity's location;
- 15) The hiring entity provided the person with business cards;
- 16) The person had to record and/or report his/her hours worked to the hiring entity;
- 17) The person was required to meet certain sales quotas;
- 18) The person was required to schedule his/her vacations with the hiring entity;
- 20) The person was subject to disciplinary action such as written reprimands for sub-standard work; and
- 21) The hiring entity had established rules and/or disciplinary guidelines, which applied to the person.

As indicated, this is not an all-inclusive list. Courts may look to other factors to determine the issue of employee versus independent contractor. However, where many of these factors are present, a court, the IRS, the Michigan Workers' Compensation Agency or Unemployment Agency may likely find an employer/employee relationship.

III. CONCLUSION

The only REALTORS® who can afford to operate without a written Independent Contractor Agreement are those who consciously determine that all salespersons should be affiliated with the firm as employees. In any other situation, operating without a written Independent Contractor Agreement almost assures future legal difficulties with various departments of the State of Michigan or the Internal Revenue Service. As an example, if a salesperson is injured while performing her duties and it is ultimately determined that she was an employee, not an independent contractor, in the absence of workers' compensation insurance coverage, the broker could be personally liable for the salesperson's workers' compensation claim. Unless salespersons are employees of the firm, no file regarding a salesperson's affiliation with the firm should be complete without an executed Independent Contractor Agreement.

A sample Independent Contractor Agreement is attached to this article as Exhibit A. Obviously, each REALTOR® will need to make certain that the terms of their written Independent Contractor Agreement are legally satisfactory to the REALTOR® and to his or her legal counsel.

A written Independent Contractor Agreement may also be an extremely useful tool for resolving in advance the most common source of disputes between REALTOR® brokers and salespersons. These disputes arise when the salesperson has decided to become affiliated with another broker as an independent contractor. A dispute arises because the parties are not certain exactly how pending sales or listings are to be handled at the termination of the

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independent contractor relationship. If there is no common law or statute that provides any direction, it is left up to a court to decide how the departing salesperson is to be compensated for pending sales or listings, if at all. The resolution of these issues is simply a matter of contract law.

Michigan Association of REALTORS®
April 2012

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*The Article is dated April 2012, but the form was updated November 2013.

EXHIBIT A

INDEPENDENT CONTRACTOR AGREEMENT

Contract Date: _____, 20_____

Brokerage Firm: _____ ("Broker")

Address of Firm: _____

Associate Broker/Salesperson: _____ ("Associate")

1. Broker, a licensed Michigan real estate broker, retains Associate, who is a licensed associate broker or a licensed salesperson, as an independent contractor to assist Broker in the performance of real estate related activities.
2. Associate agrees to work diligently and use his/her best efforts to procure real estate business for Broker. Associate is authorized to execute listing agreements and buyer broker agreements on behalf of Broker.
3. Broker will provide Associate with access to all current listings of Broker and listings made available to Broker through offers of cooperation.
4. Associate may utilize Broker's office facilities for the performance of Associate's services as provided in this Agreement.
5. Associate will conduct his/her business in a reputable manner and in conformance with the National Association of REALTORS® Code of Ethics and Arbitration Manual as amended to conform to Michigan law (the "Manual"), as well as all applicable laws, rules and regulations and the Broker's policies and procedures.
6. Broker shall have sole control over the manner in which its listings of real estate are advertised on any medium. All advertisements of listings shall prominently display the Broker's name. Associate may not display, or authorize any third party to display, Broker's listings on any website without Broker's prior written consent. Associate shall comply with all of Broker's rules and regulations governing internet advertising activities as the same may be imposed by Broker from time to time.
7. Broker and Associate intend that all photographs, images, graphics, video recordings, virtual tours, drawings, written descriptions, remarks, narratives, pricing information, and all other copyrightable elements submitted by Associate to Broker at any time with respect to a real estate listing (the "Listing Content") shall be the property of Broker and a contribution to a collective work consisting of Listing Content of all Broker's sales licensees, subject to the following:

- a. To the extent permitted under applicable law, all Listing Content shall be considered a Work Made for Hire (as such term is defined under the Copyright Act, 17 U.S.C. Section 101 and following, as amended) (a "Work Made for Hire") by Associate for Broker, and as such, shall be exclusively developed for the benefit of and owned by Broker. Broker shall exclusively own all copyrights and all other intellectual property rights in the Listing Content.
- b. To the extent that it is determined that any of the Listing Content does not qualify as a Work Made for Hire, Associate agrees to assign and transfer and does hereby irrevocably assign and transfer to Broker any and all right, title, and interest, including all copyright rights and other intellectual property rights, and all actions and causes of action related to the foregoing, and all damages, profits, and other recoveries related thereto, which Associate may have or acquire in and to any and all Listing Content. Such rights, title, and interest shall be deemed assigned as of the moment of creation without necessity of any further action on the part of either party. Associate represents and warrants to Broker with respect to the Listing Content for each listing procured by Associate that (i) each element of the Listing Content is an original work of authorship of Associate, or has been assigned to Associate, and (ii) the Listing Content and this assignment of rights to Broker do not violate or infringe upon the rights, including any copyright rights, of any person or entity.
- c. Associate agrees to take all action and execute and deliver to Broker all documents requested by Broker in connection with the transfer and assignment of rights in and to the Listing Content to Broker, and any copyright application for and registration of the Listing Content.
- d. If the foregoing assignment is determined to be unenforceable for any reason, Associate hereby grants to Broker an exclusive, non-revocable, worldwide, royalty-free copyright license to sublicense through multiple tiers, publish, display, reproduce, create derivative works of, and distribute the Listing Content or any derivative works thereof.
- e. Associate shall indemnify Broker against all damages, costs, and liabilities, including reasonable attorney fees, arising from any claim that the Listing Content or any portion of the Listing Content infringes the rights of any third party. ASSOCIATE ACKNOWLEDGES THAT THE FOREGOING SENTENCE MEANS THAT ASSOCIATE MUST OBTAIN ASSIGNMENTS FROM THE AUTHORS OF ANY PORTIONS OF THE LISTING CONTENT, INCLUDING SELLERS, AS NECESSARY FOR ASSOCIATE TO ASSIGN THE LISTING CONTENT TO BROKER AND TO OTHERWISE MAKE FULL USE OF THE LISTING CONTENT UNDER THIS AGREEMENT; IF ASSOCIATE FAILS TO DO SO, ASSOCIATE WILL ASSUME AND REIMBURSE BROKER FOR THE COST OF DEFENDING BROKER AGAINST INFRINGEMENT CLAIMS AND PAYING DAMAGES ON ANY SUCH CLAIMS.

- f. Broker hereby grants to Associate a limited, non-exclusive, and personal license to use Listing Content only for purposes as expressly allowed under Associate's license, the rules and regulations of the MLS, and under this Agreement. Associate agrees to take all reasonable steps to protect the MLS Database and Listing Content from unauthorized access, copyright or use.
8. It is expressly agreed and understood that, in the performance of his or her services hereunder, the Associate is not to be treated or otherwise considered as an employee of the Broker with respect to such services for federal tax purposes, or for any other tax purposes. It is further agreed and understood between the parties that the Broker WILL NOT withhold or pay over on behalf of the Associate any amounts relating to federal, state and local income taxes, unemployment compensation, workers' compensation or any other employer liability or responsibility. Associate agrees and understands that he or she is totally responsible for the timely reporting and payment of all income taxes and other governmental liabilities resulting from the performance of his or her services hereunder, which responsibility is not borne nor shared by the Broker in any manner whatsoever.
9. The commission, fees and other terms and conditions of contracts with clients shall be determined by Broker. When Associate performs any service hereunder for which a commission and/or fee is earned, the amount shall, when collected, be divided between Broker and Associate as set forth in the Commission Schedule incorporated herein by reference, as the same may be revised from time to time by the Broker in its sole discretion. It is expressly agreed that any amendments to the Commission Schedule shall not apply to any commission earned pursuant to a purchase agreement in place at the time of such amendment. In no case shall the Broker be personally liable to the Associate for any commission or fees, nor shall Associate be personally liable to Broker for any commission or fees, but when the funds shall have been collected from the party or parties for whom the service was performed, Broker shall hold it in trust for Associate and Broker, to be divided according to the terms of this Agreement. Payment to Associate is conditioned upon Broker's receipt of a complete file on the real estate transaction.
10. The division and distribution of earned commissions and/or fees shall take place as soon as practicable after receipt of the funds, provided however, that in the event Broker shall receive notice of a claim for all or a portion of such commission from another real estate broker, Broker may continue to hold such funds in trust until the claim is finally resolved. Arbitration requests and/or suits for commissions shall be maintained only in the name of the Broker, and the Associate shall be construed to be a subagent only, with respect to the clients and customers for whom services shall be performed.
11. Broker shall not be liable to Associate for any expenses incurred by him/her, nor shall Associate be liable to the Broker for any office expense, in each case except as may be expressly provided in this Agreement, the Commission Schedule or other written

policy or procedure. Associate shall have no authority to obligate the Broker to pay any expenses, charges or other fees.

12. Associate shall furnish an automobile at his/her sole expense when one is necessary to carry out the duties of the Associate under the terms of this Agreement. Associate shall at all times carry liability insurance on his/her automobile in a form and provided by an insurer acceptable to the Broker, with such insurance having minimum limits of \$_____ for each person and \$_____ for each accident, with a property damage limit of not less than \$_____. The minimum amounts of insurance required under the terms of this paragraph may be adjusted by the Broker as is reasonably necessary. Associate shall, upon Broker's request, have the Broker listed as an additional insured under any such insurance policy or policies, and shall cause any such insurer to agree to provide Broker with thirty (30) days prior notice of any proposed cancellation of any such policies. Associate agrees, upon reasonable request, to furnish Broker with a certificate or other documentation acceptable to Broker evidencing that all insurance required under this paragraph has been obtained by the Associate and is then presently effective. Associate agrees to indemnify and hold Broker harmless from any claim for damages asserted against the Broker by reason of any act or omission by Associate in the use of his/her automobile, such indemnification to include reasonable attorneys' fees, costs and expenses incurred by Broker in defense of any such claim.
13. This contract and the association created hereby may be terminated by either party, with or without cause, at any time, upon _____ days notice given to the other. The rights of the parties to any commission which accrued prior to notice of termination shall not be divested by the termination of this contract.
14. Associate shall not, after the termination of this contract, use to his/her own advantage, or the advantage of any other person or corporation, any information that is, or should reasonably be understood to be, confidential or proprietary to Broker.
15. In the event this Agreement is terminated for any reason, Associate shall immediately deliver all paper and electronic files to Broker, including active files.
 - a. For clients (both sellers and buyers) procured by Associate who have an agency contract in place at the time of termination (**select/modify as appropriate**):
 - Associate shall not be entitled to a commission on any sales which close after termination, unless this Agreement is terminated by Broker without cause, in which case Associate shall receive all commissions earned prior to termination which are actually received by Broker. For purposes hereof, "earned" shall refer to transactions with a binding purchase agreement in place at the time of termination.

- As to commissions actually received by Broker pursuant to binding purchase agreements in place prior to termination of this Agreement, Associate shall receive _____ percent of the commission to which he/she would have otherwise been entitled if the Agreement was still in place.*
- As to commissions actually received by Broker pursuant to purchase agreements signed after the termination of this Agreement, Associate shall receive _____ percent of the commission to which he/she would have otherwise been entitled if the Agreement was still in place. Associate shall not be entitled to any compensation in connection with purchase agreements signed during extensions to any such listings or on any re-listings.*

b. **Pending Cooperating Sales.** For cooperating sales procured by Associate which are pending at the time of termination **(select/modify as appropriate):**

- Associate shall not be entitled to a commission on any sales which close after termination, unless this Agreement is terminated by Broker without cause, in which case Associate shall receive all commissions earned prior to termination which are actually received by Broker. For purposes hereof, "earned" shall refer to transactions with a binding purchase agreement in place at the time of termination.*
- As to commissions actually received by Broker pursuant to binding purchase agreements in place prior to termination of this Agreement, Associate shall be entitled to _____ percent of the commission to which he/she would have otherwise been entitled if the Agreement was still in place.*

16. This Agreement shall be construed in accordance with the laws of the State of Michigan.

17. _____

Broker

Associate