

# **PROPERLY MANAGING INDEPENDENT CONTRACTOR RELATIONSHIPS WITH AFFILIATED LICENSEES**



# EMPLOYEE VERSUS INDEPENDENT CONTRACTOR

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- **EMPLOYEE:** Performing services for an employer who controls what will be done and how it will be done. This is true even if the employee has freedom of action. What matters is the right of the employer to control the details of the work.
- **INDEPENDENT CONTRACTOR:** Contracting to provide a service as part of a trade or profession to an entity. Business or individual to which services are provided only controls the result of the work and not the means or methods of actually accomplishing the work.

# FEDERAL LAW VERSUS STATE LAW

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- **FEDERAL LAW:** Determines whether the individual is an employee or independent contractor for the purpose of withholding federal income taxes and FICA taxes (Social Security and Medicare contributions).
- **STATE LAW:** Determines whether the individual is an employee or independent contractor for the purpose of workers compensation, unemployment insurance, state income tax withholding and wages and overtime.

# FEDERAL LAW TEST

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- **THREE-PART TEST:** If the three elements of the test are met, federal income taxes do not need to be withheld from the individual's compensation.
  - 1) Individual must be a licensed real estate professional;
  - 1) Substantially all of their compensation must be directly related to sales or lease transactions, rather than the number of hours worked; and
  - 1) Services must be performed under a written agreement providing that they will not be an employee for tax purposes.

# KAR STANDARD AGREEMENT



## INDEPENDENT CONTRACTOR AGREEMENT

Document updated:  
April 2014

**1. PARTIES:** The parties to this Independent Contractor Agreement (the “Agreement”) are:

**BROKER:** \_\_\_\_\_

**AFFILIATED LICENSEE:** \_\_\_\_\_

**2. EFFECTIVE DATE OF THE AGREEMENT:** This Agreement is entered into on the date of \_\_\_\_\_.

**3. RECITALS:**

- A. BROKER is engaged in business as a general real estate broker in the State of Kansas; is qualified to and operates a general real estate business; is duly qualified to and does procure the listings of real estate for sale, lease or rental; is duly qualified and does procure prospective purchasers, lessees and renters of real estate; and does enjoy good will and a reputation for fair dealing with the public;
- B. BROKER maintains an office in the city of \_\_\_\_\_ in the State of Kansas that is properly equipped with furnishings and other equipment necessary and incidental to the proper operation of its business and staffed with individuals capable of serving the public as a real estate broker;
- C. AFFILIATED LICENSEE is engaged in the business as a licensed real estate salesperson or broker and enjoys a reputation for fair and honest dealing with the public; and
- D. BROKER and AFFILIATED LICENSEE agree that it is to their mutual advantage to form the association as set forth in this Agreement.

# INDEPENDENT CONTRACTORS UNDER KANSAS STATE LAW

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- **COMMON LAW TEST:** Kansas uses a 20-factor test to determine whether an individual is an employee or an independent contractor under state wage and overtime law and for state income tax withholding.
- **WORKERS COMPENSATION:** Real estate licensees that are affiliated as independent contractors have an explicit exemption under the statute.
- **UNEMPLOYMENT INSURANCE:** Real estate licensees that are affiliated as independent contractors have an explicit exemption under the statute.

# UNEMPLOYMENT INSURANCE FOR REAL ESTATE LICENSEES

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- “Qualified real estate agents” acting as independent contractors are exempt from paying for unemployment insurance under K.S.A. 44-703(i)(4)(Q).
- A “qualified real estate agent” is an independent contractor if: (1) he or she is licensed by KREC as a broker or salesperson; (2) substantially all of their compensation is directly related to the number of sales or lease transactions rather than hours worked; and (3) the services performed by the individual are pursuant to a written agreement that provides that individual will not be treated as an employee.

# WORKERS COMPENSATION FOR REAL ESTATE LICENSEES

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- “Qualified real estate agents” acting as independent contractors are exempt from paying for workers’ compensation under K.S.A. 44-505(a)(5).
- A “qualified real estate agent” is an independent contractor if: (1) he or she is licensed by KREC as a broker or salesperson; (2) substantially all of their compensation is directly related to the number of sales or lease transactions rather than hours worked; and (3) the services performed by the individual are pursuant to a written agreement that provides that individual will not be treated as an employee.



# 20-FACTOR TEST UNDER KANSAS STATE LAW

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- **COMMON LAW TEST:** Kansas uses a 20-factor test to determine whether an individual is an employee or an independent contractor under state wage and overtime law and for state income tax withholding.
- **Even if the arrangement is called an “independent contractor” relationship and there is a written independent contractor agreement, a violation of the 20-factor test could lead to liability.**
- **The main focus of the 20-factor test is the “right of control” over the means and methods of the work.**

# **20-FACTOR TEST UNDER KANSAS STATE LAW**

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- 1) Employer's right to require compliance with instructions;**
- 2) Extent of any training provided by the employer;**
- 3) Degree of integration of worker's services into the business;**
- 4) Requirement that services be provided personally by worker;**
- 5) Extent to which worker hires, supervises and pays assistants;**
- 6) Continuing relationship between worker and employer;**
- 7) Employer's establishment of set working hours;**
- 8) Requirement that worker devote full time to business;**
- 9) Degree to which work is performed on employer's premises;**
- 10) Degree to which employer sets order and sequence of work;**

# **20-FACTOR TEST UNDER STATE LAW CONTINUED . . .**

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- 11) Requirement to submit regular or written reports to employer;**
- 12) Manner of payments to worker (by hour, day or job);**
- 13) Employer pays the worker's business or travel expenses;**
- 14) Employer furnishes equipment, tools and material;**
- 15) Incurrence of significant investments by worker;**
- 16) Ability of worker to make a profit or suffer a loss;**
- 17) Whether worker can work for more than one business;**
- 18) Whether worker makes services available to general public;**
- 19) Whether employer has the right to discharge the worker; and**
- 20) Whether worker has the right to terminate the relationship.**

# GOOD BUSINESS PRACTICES FOR REAL ESTATE BROKERS

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# THINGS YOU SHOULD DO

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- ✓ Enter into written independent contractor agreements with all affiliated real estate licensees;
- ✓ Regularly review and update those agreements to ensure that both parties are complying with the terms;
- ✓ Require affiliated licensees to provide their own tools and materials, including a vehicle, mobile devices and computers;
- ✓ Require affiliated licensees to cover their own expenses, such as travel, gas, conference registrations and mobile phone bills;
- ✓ Keep all compensation to affiliated licensees based explicitly on sales and lease transactions; and
- ✓ Require all affiliated licensees to purchase their own health insurance and other fringe benefits.

# BAD BUSINESS PRACTICES FOR REAL ESTATE BROKERS

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# THINGS YOU CANNOT DO

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- ✓ **Require affiliated licensees to provide non-essential written reports or attend sales meetings on a periodic basis;**
- ✓ **Require affiliated licensees to “man the phones” or work “desk duty” at the brokerage’s office;**
- ✓ **Refer to affiliated licensees as “employees” or “staff”;**
- ✓ **Provide affiliated licensees with compensation that is not based explicitly on sales and lease transactions;**
- ✓ **Provide health insurance or other fringe benefits to affiliated licensees and their family members; and**
- ✓ **Seek to exert control over the means and methods as to how affiliated licensees interact with members of the public (other than ensuring they comply with state real estate law).**

# ADDITIONAL RESOURCES

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- NAR's website on independent contractor-related issues at <http://www.realtor.org/topics/independent-contractor>
- NAR Legal Affairs video on independent contractor issues <http://www.realtor.org/videos/window-to-the-law-worker-classification-for-real-estate-professionals>
- Ten Ways to Manage Independent Contractor Relationships: <http://www.realtor.org/articles/ten-ways-to-successfully-manage-your-independent-contractor-relationships>
- NAR's Frequently Asked Questions on Independent Contractors <http://www.realtor.org/law-and-ethics/independent-contractor-status-frequently-asked-questions>





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