

HB

409

SFIN

FILE

SENATE FINANCE COMM. TTEE REPORT

REPORTED OUT
MAY 06 2006
SENATE FINANCE COMMITTEE

DATE: 4/28/06

FURTHER:

DATE TURNED
IN TO OFFICE: 6 May 2006

Finance Committee considered CS FOR HOUSE BILL NO. 409(L&C)

HB 409 NO WORKERS' COMP. FOR REAL EST. LICENSEE

"An Act relating to excluding qualified real estate licensees from workers' compensation coverage."

and recommends:

- be replaced with _____ CS _____ (_____)
- adopt previous _____ CS _____ (_____)
- attached amendment(s)
- adopt Letter of Intent by _____ Committee
- further reirerral to _____ Committee

CS Senate Bill:
 Same Title
 New Title

SCS House Bill:
 Same Title
 Technical Title Change
 New Title w/ SCR # _____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Ind.	Zero	FN#

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Ind.	Zero	FN#
Commerce	2/24/06			✓	#1
Labor	2/24/06			✓	#2

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	Do PASS	Do NOT PASS	NO REC	AMEND
<i>[Signature]</i>	✓			
<i>[Signature]</i>			—	
<i>[Signature]</i>	✓			
<i>[Signature]</i>	✓			
COCHAIR: <i>[Signature]</i>	✓			
COCHAIR: <i>[Signature]</i>	✓			

FISCAL NOTE

REPORTED OUT
 MAY 06 2006
 SENATE FINANCE COMMITTEE

STATE OF ALASKA
 2006 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: CSHB 109(L&C)
 (H) Publish Date: 3/1/06

Revision Date/Time (Note if correction): _____ Dept. Affected: Commerce
 Title: No Workers' Comp for Real Estate Licensee RDU: Corp. Bus & Prof Licensing (117)
 Component: Corp. Bus & Prof Licensing
 Sponsor: Lynn Rokeberg
 Requester: Labor & Commerce Component No: 2360

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation, unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ()	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
1156 Receipt Supported Services						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2006) cost: 0.0
 Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This legislation excludes real estate licensees from workers' compensation coverage. It does not impact the operations of the division.

Prepared by: Katherine Mason, Administrative Manager Phone: (907) 465-2572
 Division: Corporations and Licensing Date/Time: 2/24/06 5:17 PM
 Approved by: William C. Noll, Commissioner Date: 2/24/2006
 Agency: Commerce, Community, and Economic Development

FISCAL NOTE

REPORTED OUT
 MAY 0 6 2006
 SENATE FINANCE COMMITTEE

STATE OF ALASKA
 2006 LEGISLATIVE SESSION

Fiscal Note Number: 2
 Bill Version: CSHB 409(L&C)
 (H) Publish Date: 3/1/06

Revision Date/Time (Note if correction): _____ Department: Labor and Workforce Development
 Title: No Workers' Compensation For Real Estate RDU: Workers' Compensation
Licensee Component: Workers' Compensation
 Sponsor: Representative Lynn
 Requester: House L&C Component Number: 344

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type - Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2006) cost: None
 Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary.)

There is no anticipated fiscal impact to the department as a result of this legislation.

Prepared by: Paul F. Lisankie, Director Phone: 465-6059
 Division: Workers' Compensation Date/Time: 2/23/06 12:01 PM
 Approved by: Greg O'Claray, Commissioner Date: 2/23/2006
 Agency: Department of Labor and Workforce Development

COMMITTEE COPY

Alaska State Legislature

Chairman

Military & Veterans' Affairs Committee

Member

Labor and Commerce Committee

State Affairs Committee

Economic Development, Trade & Tourism
Committee

Education Committee

Joint Armed Services Committee

Finance Subcommittees

Labor & Workforce Development

Community & Economic Development

Military & Veterans' Affairs



A Communication From

REPRESENTATIVE BOB LYNN
District 31 Anchorage

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"Bob Lynn's Alaska Blog" AlaskaDistrict31.blogspot.com

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Sponsor Statement

CS for HB 409

Exempt Qualified Real Estate Licensees from Worker's Compensation Coverage

HB 409 would amend AS 23.30.230 to specifically exempt certain real estate professionals from workers' compensation coverage.

Most real estate licensees in Alaska are independent contractors. They are licensed under a broker because that is state law, but they operate their individual business as "independent contractors."

In the real world, this means that these licensees do not receive a wage, salary or benefits. They control and decide what days and hours they will work in order to achieve the goals they set for themselves. Business expenses paid by the licensee include: licensing fees, continuing education, advertising, long-distance phone calls, and business insurance on their vehicles. They often pay for their own computer, printer, and other office equipment, and create and pay for their own individual websites. Independent Contractors pay quarterly estimated income tax and pay, not only for their own social security taxes, but that portion of the social security tax that an employer would normally pay.

In short, real estate licensees operate an independent business within a business. For these reasons, it is an unnecessary financial hardship and inappropriate for the business owner to pay workers compensation for these independent contractors. In fact, the Federal Government - IRS recognizes qualified real estate licensees as independent contractors and by passing HB 409, the state would too.

Your support of this bill is respectfully requested.

Sec. ~~23.30.230~~ Persons not covered.

(a) The following persons are not covered by this chapter:

(1) a part-time baby-sitter;

(2) a cleaning person;

(3) harvest help and similar part-time or transient help;

(4) a person employed as a sports official on a contractual basis and who officiates only at sports events in which the players are not compensated; in this paragraph, "sports official" includes an umpire, referee, judge, scorekeeper, timekeeper, organizer, or other person who is a neutral participant in a sports event;

(5) a person employed as an entertainer on a contractual basis;

(6) a commercial fisherman, as defined in AS 16.05.940 ;

(7) an individual who drives a taxicab whose compensation and written contractual arrangement is as described in AS 23.10.055 (a)(13), unless the hours worked by the individual or the areas in which the individual may work are restricted except to comply with local ordinances;

(8) a participant in the Alaska temporary assistance program (AS 47.27) who is engaged in work activities required under AS 47.27.035 other than subsidized or unsubsidized work or on-the-job training; and

(9) a person employed as a player or coach by a professional hockey team if the person is covered under a health care insurance plan provided by the professional hockey team, the coverage is applicable to both work related and nonwork related injuries, and the coverage provides medical and related benefits as required under this chapter, except that coverage may not be limited to two years from the date of injury as described under AS 23.30.095 (a); in this paragraph, "health care insurance" has the meaning given in AS 21.12.050 .

(b) The exclusion of certain persons under (a) of this section may not be construed to require inclusion of other persons as employees for purposes of compensation under this chapter.

(c) In this section,

(1) "on-the-job training" means training provided by an employer under a formal agreement with a department of the state, or an agent of a department, for which wages are paid by the employer to a participant in the Alaska temporary assistance program (AS 47.27) while the participant receives job training;

(2) "subsidized work" means employment, by an employer, of an Alaska temporary assistance program participant in a work placement for which the participant receives wages from the employer, subsidized by, and subject to an agreement between the employer and, a department of the state or an agent of a department; "subsidized work" does not include community work service, job sampling placements, or preplacement activities such as job readiness assessments, job searches, education, or vocational training.

(3) "unsubsidized work" means employment, by an employer, secured by an Alaska temporary assistance program participant, with or without the assistance of a department of the state or an agent of a department, for which the participant receives wages from the employer; "unsubsidized work" does not include self-employment.

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DEPARTMENT OF
COMMERCE
COMMUNITY AND
ECONOMIC DEVELOPMENT
Division of Insurance

Frank H. Murkowski, Governor
William C. Noll, Commissioner
Linda S. Hall, Director

To: Representative Bob Lynn
Representative Norman Rokeberg
Representative Ethan Berkowitz

Date: April 6, 2006

Re: HB 409

From: Linda Hall

On the House floor yesterday during discussion on the above bill, a question was asked regarding the claim's history for the realtors classification. I have asked for information from the National Council on Compensation Insurance and received the following information:

There is no specific realtor code in Alaska. The primary codes used are 8742 (outside sales) for sales agents and 8810 (clerical) for support staff. These classifications are very broad groupings encompassing all outside sales reps and support staff across the state and there is no way to segregate real estate from others in these groupings.

Code	Frequency (Claims/\$1 Million Payroll)	Average Severity
8742 (Sales)		
2002-2003	.365	\$ 9,140
2001-2002	.515	\$12,731
2000-2001	.466	\$10,978
1999-2000	.731	\$ 7,983
8810 (Clerical)		
2002-2003	.518	\$ 9,832
2001-2002	.535	\$11,339
2000-2001	.663	\$10,811
1999-2000	.650	\$ 8,675
State Totals (All Classes)		
2002-2003	1.966	\$15,349
2001-2002	2.160	\$14,349
2000-2001	2.513	\$12,474
1999-2000	2.644	\$10,085

Since the groupings for these two classifications are so broad, it is difficult, if not impossible, to make any meaningful analysis of the frequency or severity of claims within the real estate industry. The information does give some overall idea of the nature of the exposure for the overall risk faced by the broad group.

For example, the number of claims (frequency) has decreased while the average cost of a claim (severity) has increased. These trends exist in both the sales class and the clerical class as well as for the state as a whole. While the number of claims for the sales class is generally less than the number of clerical claims, the average cost of a claim is comparable for both classes. Compared to the state totals, the frequency is significantly less for the sales and clerical classes but the severity is only somewhat lower.

As an additional piece of information, the current rates per \$100 of payroll for these classifications taken from the assigned risk pool are \$1.21 for the outside sales classification and \$1.26 for the clerical classification.

Please do not hesitate to contact me should you have questions or if you would like to discuss this information in more depth.

STATE OF ALASKA

Department Of Labor and Workforce Development

FRANK H. MURKOWSKI, GOVERNOR

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Juneau, AK 99802-1149
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OFFICE OF THE COMMISSIONER

February 7, 2006

The Honorable Thomas Anderson, Chair
House Labor and Commerce Committee
State Capitol, Room
Juneau, Alaska 99801-1182

Dear Chairman Anderson:

My staff and I have reviewed the provisions of HB 409 currently before your committee. As you know HB 409 would amend AS 23.30.230 to specifically exempt certain real estate professionals from workers' compensation coverage. The exemption is limited to professionals licensed (under the provisions of AS 08.88.161) as real estate brokers, associate real estate brokers, or real estate salespersons. In order for the exemption to apply, those licensed professionals will have to be working under a written employment contract that provides they will not be treated as "employees" for either workers' compensation or federal income taxation purposes. As well, their pay will have to be directly related to sales or output rather than hours worked.


As workers' compensation benefits are a vital part of our social safety net, I usually speak against new exemptions from the Workers' Compensation Act. However, it is only fair to acknowledge that much of the real estate sales industry has consistently chosen to organize in ways that already allow licensed professionals to work without workers' compensation coverage. Those organizations include sole proprietorships, partnerships, limited liability companies, corporations whose officers waive workers' compensation coverage, and properly established "independent contractor" relationships. Unfortunately, a definitive determination whether an independent contractor relationship has been properly established can only be obtained on a case-by-case basis from the Workers' Compensation Board after an injury. That leads to uncertainty, frequent disagreements about the employer's insurance coverage and premiums, and considerable frustration throughout the real estate sales industry.

There is no easy way to remove that general uncertainty because it arises from the need to apply a fact-specific, twelve-point "relative nature of

the work" test developed by the Alaska Supreme Court to define the "independent contractor" relationship. In light of that fact, I support the focused exemption for licensed real estate professionals contained in HB 409 in order to relieve the current unacceptably uncertain situation.

Thank you for the opportunity to address this legislation.

Sincerely,



Greg O'Claray
Commissioner

Nancy Manly

From: Mark Korting [markkorting@remax.net]
Sent: Monday, February 06, 2006 5:51 PM
To: Rep. Bob Lynn
Subject: Thank you Bob...
Follow Up Flag: Follow up
Flag Status: Yellow

Representative Lynn, (Bob)

I am sending you a copy of an email I will be sending to all the Representatives on the Labor & Commerce Committee. I have only sent this to you and Rep. Tom Anderson so far. Any comments?

Dear Representative

A bill sponsored by Rep. Bob Lynn will be headed toward your Labor & Commerce Committee soon. The Bill is HB 409. I support this bill and would encourage you to do the same. I've been fighting this issue for years and there was a time, not all that long ago, when real estate licensees were exempted from Workers Compensation Insurance as we were considered "independent contractors" by insurers as well as the Board. We would like the option to be able to have, or not have, coverage for our independent contractors. They could also purchase coverage for themselves if they chose to do so.

We, real estate licensees, have been, and still are, considered by the Internal Revenue Service to be acting as independent contractors. Our licensees here at RE/MAX Properties, Inc. execute a very complete and thorough 11 page Independent Contractor Agreement and pay for all their services. I have owned and operated this business since 1980. I also have the franchise for RE/MAX offices throughout the State.

I would be glad to answer any questions you may have and may be able to testify in person a little later in the session.

Also, I would like to take a moment to "Thank you for serving"! I appreciate all you sacrifice to try to make Alaska a better place to live.

Thank you Tom, for your attention to this matter. I don't ask for much and try to ask for things that seem reasonable. There are a lot of complicated issues here in the Workers Comp Statutes.

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[Home](#)[Tax Forms & Tax Help](#)[IRS Problems & Solutions](#)[Research IRS Documents](#)[Online Resources](#)[Home](#) > [Authors Row](#) > [Greta P. Hicks, CPA](#) > [Employee or Contractor?](#)

Employee or Contractor? "The Definition Is Changing-- Again!"

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"For nearly 20 years, the IRS has been prohibited by law from issuing any guidance regarding employment tax status," Commissioner Richards said. In 1986 and in 1995, when this author attended the White House Conference on Small Business, the employee versus contractor issue was discussed at length by irate businesses owners. It appears that the IRS has at last heard our complaint. In a March 18 announcement, IRS Commissioner Richardson stated, "People have complained about the uncertainty that results from worker classification under the (20) common law standard(s), yet we (the IRS) are prohibited from issuing guidance that is more up to date. I believe that these initiatives we are announcing today will help ease some pressures that both the business community and the IRS face."



The IRS announced on March 18, 1996 that they are suspending employee-independent contractors audits for the next few months and they have developed new audit training manuals and employment tax audit guidelines. Also included in this announcement is a "let's make a deal" settlement offer.

Whether a worker is defined as an employee or independent contractor is a matter of a complex set of 20 common law factors plus interpretations by numerous court cases. Back in the late 70's the courts and IRS audit teams were overwhelmed with mountains of audits related to the definition of an employee. A cry went from businesses to Capital Hill and Congress passed Section 530 of the Revenue Act of 1978. Companies received a brief reprieve from employment tax audits until the late 80's and early 90's when the IRS began re-attacking the employee versus contractor issue. Now, with the IRS audit teams again being in a quagmire over the issue, the IRS has taken the initiative to more clearly define employee and to offer those businesses already under audit an alternative to bankruptcy.

The most recent suspension of employee versus contractor audits is to give the IRS time to train auditors in field on a new manual procedure related to worker reclassification. The training materials will focus on defining an employee by determining the control the company has over the workers. The materials discuss the control factors under the 20 common law standards and guides auditors in determining which of those 20 factors are relevant. The IRS defines control as

Anyone who performs services is an employee if you, as an employer, can control what will be done and how it will be done. This is so even when you give the employee freedom of action. What matters is that you have the legal right to control the method and result of the services.

A draft copy of the new manual on worker reclassification can be obtained free. Write Dean, IRS School of Taxation, CD TX, 2221 S. Clark St., Arlington, VA 22202.

Safe-Harbor Rules

Section 530 of the Revenue Act of 1978, prohibited the IRS by law from issuing any guidance regarding employment tax status and proposed several "safe-harbor rules" for companies who

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were under employment tax audits. Roughly, Section 530 passed by Congress in 1978 said, "IRS lay off until we (Congress) defines an employee." Here 18 years later, Congress has not define employee and has prohibited the IRS from issuing any regulations on the subject.

Over the years, the IRS interpretation of the "safe-harbor rules" has gone from liberal to conservative. In 1979 and 1980 on most employment tax audits, the IRS allowed company's to fall under the safe-harbor rules. But during the era of the "no new taxes," the IRS began a ultra conservative interpretation of Section 530 and it was near impossible for any company under IRS employment tax audit to claim the safety of Section 530.

On March 18 the IRS announced that they are establishing new procedures that will ensure that auditors properly apply the taxpayer relief provisions under Section 530 of the Revenue Act of 1978. The new policy on application of the safe-harbor rules will be more liberal and allow more companies to rely upon Section 530 safe havens.

Let's Make A Deal

The most significant aspects of the March 18 announcement details the two new expedited procedures for companies whose existing worker classifications are being questioned by the IRS.

First, the IRS is establishing new procedures under an optional classification settlement program that will allow companies and auditors to resolve contractor versus employee issues earlier in the audit process.

For example, companies that filed Form 1099, Information Returns, but failed to meet the other two requirements under Section 530 safe-harbor rules, could reclassify their workers to employees prospectively and pay only a specified tax assessment not exceeding one year's liability. The amount of the assessment would depend on the extent to which the company has satisfied the safe-harbor requirements under Section 530.

Secondly, the IRS has expanded procedures developed last year to allow companies to, at their option, to appeal employee versus contractor issues to the IRS Appeals function even while an audit is in progress. This procedure, which is a part of the taxpayer rights initiatives the IRS announced earlier this year, is designed to resolve employee versus contractor issues earlier in the audit process.

Time Line

On March 5, 1996, the IRS began a two year test period of the classification settlement program. A one year test of the early referral to Appeals procedures begins on March 18, 1996.

During the suspension of the employee versus independent contractors audits, the IRS will be training field office personnel on the new expedited procedures for companies currently under audit. This author believes that because the training has not been budgeted for during the current fiscal year, the training will not take place until after October 1, 1996, the beginning of the next fiscal year's budget. The effect of budget constraints will be to put on hold any existing audits or appeals until after the training of field personnel. The date of the training will vary across the country depending upon other budgetary demands of local offices.

Bottom Line

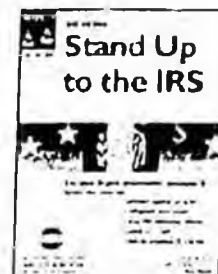
Under this new policy, the IRS will waive much of the back taxes it asserts that companies owe. For many companies that have been consistent in how they classify their workers, the IRS will let them to shift to employee status without penalties for prior years. This policy is consistent with other recent policy changes which focus on future compliance of companies rather than concentrating heavily of punishment for past non-compliance with the laws. Although not a solution for every company, it is a beginning step to settlement.

For More Information

<http://www.unclefed.com/AuthorsRow/GretalHicks/employeecon.html>

Contesting IRS Penalties

By Holmes F. Crouch



By Frederick W. Daily



By Frederick W. Daily

Call the IRS at 1-800-TAX-FORM and ask for Publication 937, Business Reporting, and for Form SS-8, Information for Use in Determining Whether a Worker is an Employee for Federal Employment Taxes and Income Tax Withholding. The purpose of the SS-8 is for workers and companies to answer the questions, mail the SS-8 to their Service Center, and receive back a Private Letter Ruling from the IRS on the status of the company's worker(s). Do not take these questions lightly. Secure a copy of the SS-8 for yourself. The questions are worded in such a way that most all workers are employees. Occasionally, the IRS Revenue Officers requests that companies complete SS-8. Professional tax advise should be sought before submitting this or other forms to the IRS.

Who Is An Employee?

The IRS Definition

The Internal Revenue Service uses these criteria to determine whether an individual is an employee or an independent contractor. The worker is an employee if

- You or your representative tells the worker where, when, and how to work
- You train the worker
- The business performance depends on the worker
- The worker has a continuing relationship with the company
- The worker's services must be personally rendered by the him/her
- You set the worker's work hours
- The worker works on the employer's premises
- You are paid by the hour, weeks, or month
- You furnish tools and materials
- You can fire the worker without violating a contract
- The worker has a right to quit without incurring a liability
- The worker does not offer the worker's services to the public at large
- The worker has no opportunity for profit or loss as a result of the worker's service
- The worker has no significant investment in the business
- You require the worker to submit oral or written reports
- The worker is a corporate officer

Section 530 Safe Harbor Rules

Section 530 provides certain safe-harbor rules. If you could fall under these safe-harbor rules, the IRS could not re-define the worker as a employee. In general if, the

- company treated in individuals consistently as a contractor, and the
- company was in full compliance by filing all required forms such as Form 1099, and if, the
- company could rely on one of three basis for their practice of carrying the worker as a contractor
 - Judicial precedent (A court case in the company's favor)
 - Past IRS Audit (A past IRS audit determine the worker to be a contractor)
 - Industry Practice (There is a long-standing in sized practice of treating such workers as contract)
- then, the IRS could not change the status of the worker to employee

20 Common Law Factors

- 1 Instruction
- 2 Training
- 3 Integration
- 4 Service rendered personally

- 5 Hiring, supervising, and paying assistants
- 6 Continuing relationship
- 7 Set hours of work
- 8 Full-time work required
- 9 Doing work on business owner's premises
- 10 Accomplishing work in certain order or sequence
- 11 Submission of oral or written reports
- 12 Method of payment
- 13 Payment of business or traveling expenses
- 14 Furnishing tools and equipment
- 15 Significant investment
- 16 Realization of profit or loss
- 17 Work for one entity at a time
- 18 Offer their services to the general public
- 19 Right to discharge
- 20 Right to terminate

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[List of Articles by Greta P. Hicks, CPA](#)

GRETA P. HICKS, CPA and former IRS manager, concentrates in solutions to IRS problems and advises business and tax professional on IRS policies and procedures. Ms Hicks is owner of TAX SOLUTIONS, Inc., a company providing educational materials and programs on solutions to IRS problems and is a nationally known speaker and writer on solutions to IRS problems. To arrange for consultation contact gretahickscpa@yahoo.com Greta's web site <http://www.gretahicks.com>

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Licensed Real Estate Agents - Real Estate Tax Tips

Most real estate professionals operate their business as a sole proprietorship. This means that you are not someone's employee, you haven't formed a partnership with anyone, and you have not incorporated your business.

Statutory Nonemployees

Licensed real estate agents are statutory nonemployees and are treated as self-employed for all Federal tax purposes, including income and employment taxes, if

- Substantially all payments for their services as real estate agents are directly related to sales or other output, rather than to the number of hours worked
- Their services are performed under a written contract providing that they will not be treated as employees for Federal tax purposes

This category includes individuals engaged in appraisal activities for real estate sales if they earn income based on sales or other output.

Additional Resources

Publication 15-A, Employer's Supplemental Tax Guide (Supplement to Circular E, Employer's Tax Guide, Publication 15)

18. **Making Service Available to General Public.** Does the worker offer services to the public? The fact that a worker makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship.
19. **Right to Discharge.** Can the worker be fired? The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is the employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired as long as the independent contractor produces a result that meets the contract specifications.
20. **Right to Terminate.** Can the worker quit without incurring liability? If the worker has the right to end his or her relationship with the person for whom the services are performed at any time without incurring liability, an employer/employee relationship exists.

These are the factors the IRS has used when determining whether a real estate salesperson is an employee or common-law independent contractor. Some examples of how these factors have been applied can be found in the summaries of relevant case decisions and private letter rulings in the Appendix.

The Federal "Safe Harbor" Rule

Also of interest to real estate brokers who desire to maintain a common-law independent contractor relationship with salespeople is the "safe harbor" provision under Section 530 of the Revenue Act of 1978.

Under this section, the IRS exempts independent contractors from the 20 common law factors if all of the following three criteria are met:

1. Individuals doing similar work have been consistently treated like independent contractors since December 31, 1977.
2. The independent contractor never has been treated like an employee, and since December 31, 1978, 1099s have been filed for the independent contractor.

3. There was a reasonable basis for treating the worker as an independent contractor based on:
 - Similar judicial rulings, IRS rulings, or an IRS technical advice memorandum;
 - Previous audits, in which a broker was not fined for treating workers doing similar work as independent contractors; or
 - Practice in the industry to treat such workers as independent contractors.

This exemption does not apply to state law requirements such as state income tax withholding, workers' compensation, and unemployment compensation. Nor does it apply to legal liability: for example, for tortious acts of the sales associate.

Statutory Independent Contractor (Non-Employee)

Due in part to the difficulty that frequently arose in the application of the 20 factors by the Internal Revenue Service, in 1982, under the Tax Equity and Fiscal Responsibility Act (TEFRA), Congress created a new category of independent contractor for federal tax purposes known as a "statutory non-employee" or "statutory independent contractor." It is contained in Section 3508 of the Internal Revenue Code.

In order to qualify as a statutory independent contractor, the following three criteria must be met:

1. The sales associate must be a licensed real estate agent.
2. Substantially all of the sales associate's remuneration for the services performed as a real estate agent must be directly related to sales or other output rather than to the number of hours worked.
3. A written agreement must exist between the sales associate and the person for whom he or she works, which agreement must provide that the sales associate will not be treated as an employee with respect to such services for federal tax purposes.

This three-part test is far less complicated than the application of multiple factors under the common law.

Licensure

The licensure requirement should be easily satisfied by all real estate salespeople in view of the license law requirements in all states, territories, and the District of Columbia.

INDEPENDENT CONTRACTOR OR EMPLOYEE?



SECTION 530 PROVIDES
BUSINESSES WITH
RELIEF FROM FEDERAL
EMPLOYMENT TAX
OBLIGATIONS IF CERTAIN
REQUIREMENTS ARE MET.

SECTION 530 RELIEF REQUIREMENTS

Your business has been selected for an employment tax examination to determine whether you correctly treated certain workers as independent contractors. However, you will not owe employment taxes for these workers, if you meet the **relief requirements** described below. If you do not meet these **relief requirements**, the IRS will need to determine whether the workers are independent contractors or employees and whether you owe employment taxes for those workers.

Section 530 Relief Requirements:
To receive relief, you must meet all three of the following requirements:

I. Reasonable Basis

First, you had a reasonable basis for not treating the workers as employees. To establish that you had a reasonable basis for not treating the workers as employees, you can show that:

- You reasonably relied on a court case about Federal taxes or a ruling issued to you by the IRS; or
- Your business was audited by the IRS at a time when you treated similar workers as independent contractors and the IRS did not reclassify those workers as employees; or

- You treated the workers as independent contractors because you knew that was how a significant segment of your industry treated similar workers; or
- You relied on some other reasonable basis. For example, you relied on the advice of a business lawyer or accountant who knew the facts about your business.

If you did not have a reasonable basis for treating the workers as independent contractors, you do not meet the **relief requirements**.

II. Substantive Consistency

In addition, you (and any predecessor business) must have treated the workers, and any similar workers, as independent contractors. If you treated similar workers as employees, this relief provision is not available.

III. Reporting Consistency

Finally, you must have filed Form 1099-MISC for each worker, unless the worker earned less than \$600. Relief is not available for any year you did not file the required Forms 1099-MISC. If you filed the required Forms 1099-MISC for some workers, but not for others, relief is not available for the workers for whom you did not file Forms 1099-MISC.

The IRS examiner will answer any questions you may have about your eligibility for this relief.





This Employment Tax Resource Courtesy Of
The Independent Contractor Report
 James R. Uquhart III, Esq.
 Editor

Full Text, as Amended
 of
Section 530
 of the
Revenue Act of 1978
 entitled
**Controversies Involving Whether Individuals are Employees
 for Purposes of Employment Taxes**

Section 530 Table of Contents

- (a) Termination of Certain Employment Tax Liability.
- (b) Prohibition Against Regulations and Rulings on Employment Status.
- (c) Definitions.
- (d) Exception.
- (e) Special Rules For Application of Section.

Section 530 of the Revenue Act of 1978, 26 U.S.C.A. Sec. 3401 note, Pub. L. 95-600; as amended by Pub. L. 96-167, Sec. 9(d), Dec. 29, 1979, 93 Stat. 1278; Pub. L. 96-541, Sec. 1, Dec. 17, 1980, 94 Stat. 3204; Pub. L. 97-248 [Tax Equity and Fiscal Responsibility Act of 1982], title II, Sec. 269(c)(1), (2), 96 Stat. 552; Pub. L. 99-514, Sec. 2, title XVII, Sec. 1706(a), Oct. 22, 1986, 100 Stat. 2095, 2781; Pub. L. 104-188 [Small Business Job Protection Act of 1996] Sec. 1122, August 20, 1996, provides that:

(a) Termination of Certain Employment Tax Liability. [Top]

(1) In general.

- If -

(A) for purposes of employment taxes, the taxpayer did not treat an individual as an employee for any period, and

(B) in the case of periods after December 31, 1978, all Federal tax returns

(including information returns) required to be filed by the taxpayer with respect to such individual for such period are filed on a basis consistent with the taxpayer's treatment of such individual as not being an employee,

then, for purposes of applying such taxes for such period with respect to the taxpayer, the individual shall be deemed not to be an employee unless the taxpayer had no reasonable basis for not treating such individual as an employee.

(2) Statutory standards providing one method of satisfying the requirements of paragraph (1).

- For purposes of paragraph (1), a taxpayer shall in any case be treated as having a reasonable basis for not treating an individual as an employee for a period if the taxpayer's treatment of such individual for such period was in reasonable reliance on any of the following:

(A) judicial precedent, published rulings, technical advice with respect to the taxpayer, or a letter ruling to the taxpayer;

(B) a past Internal Revenue Service audit of the taxpayer in which there was no assessment attributable to the treatment (for employment tax purposes) of the individuals holding positions substantially similar to the position held by this individual; or

(C) long-standing recognized practice of a significant segment of the industry in which such individual was engaged.

(3) Consistency required in the case of prior tax treatment.

- Paragraph (1) shall not apply with respect to the treatment of any individual for employment tax purposes for any period ending after December 31, 1978, if the taxpayer (or a predecessor) has treated any individual holding a substantially similar position as an employee for purposes of the employment taxes for any period beginning after December 31, 1977.

(4) Refund or credit of overpayment.

- If refund or credit of any overpayment of an employment tax resulting from the application of paragraph (1) is not barred on the date of the enactment of this Act (Nov. 6, 1978) by any law or rule of law, the period for filing a claim for refund or credit of such overpayment (to the extent attributable to the application of paragraph (1)) shall not expire before the date 1 year after the date of the enactment of this Act (Nov. 6, 1978).

(b) Prohibition Against Regulations and Rulings on Employment Status.

[Top]

- No regulation or Revenue Ruling shall be published on or after the date of the enactment of this Act (Nov. 6, 1978) and before the effective date of any law hereafter enacted clarifying the employment status of individuals for purposes of the employment taxes by the Department of the Treasury (including the Internal Revenue Service) with respect to the employment status of any individual for purposes of the employment taxes.

(c) Definitions. [Top]

- For purposes of this section -

(1) **Employment tax.** - The term 'employment tax' means any tax imposed by subtitle C of the Internal Revenue Code of 1986 (formerly I.R.C. 1954, section 3101 et seq. of this title).

(2) **Employment status.** - The term 'employment status' means the status of an individual, under the usual common law rules applicable in determining the employer-employee relationship, as an employee or as an independent contractor (or other individual who is not an employee).

(d) Exception. [Top]

- This section shall not apply in the case of an individual who, pursuant to an arrangement between the taxpayer and another person, provides services for such other person as an engineer, designer, drafter, computer programmer, systems analyst, or other similarly skilled worker engaged in a similar line of work.

(e) Special Rules For Application of Section. [Top]**(1) NOTICE OF AVAILABILITY OF SECTION**

- An officer or employee of the Internal Revenue Service shall, before or at the commencement of any audit inquiry relating to the employment status of one or more individuals who perform services for the taxpayer, provide the taxpayer with a written notice of the provisions of this section.

(2) RULES RELATING TO STATUTORY STANDARDS

- For purposes of subsection (a)(2) -

(A) a taxpayer may not rely on an audit commenced after December 31, 1996, for purposes of subparagraph (B) thereof unless such audit included an examination for employment tax purposes of whether the individual involved (or any individual holding a position substantially similar to the position held by the individual involved) should be treated as an employee of the taxpayer,

(B) in no event shall the significant segment requirement of subparagraph (C) thereof be construed to require a reasonable showing of the practice of more than 25 percent of the industry (determined by not taking into account the taxpayer), and

(C) in applying the long-standing recognized practice requirement of subparagraph (C) thereof-

(i) such requirement shall not be construed as requiring the practice to have continued for more than 10 years, and

(ii) a practice shall not fail to be treated as long-standing merely because such practice began after 1978

(3) AVAILABILITY OF SAFE HARBORS

- Nothing in this section shall be construed to provide that subsection (a) only applies where the individual involved is otherwise an employee of the taxpayer.

(4) BURDEN OF PROOF-**(A) IN GENERAL**

- If -

(i) a taxpayer establishes a prima facie case that it was reasonable not to treat an individual as an employee for purposes of this section, and

(ii) the taxpayer has fully cooperated with reasonable requests from the Secretary of the Treasury or his delegate,

then the burden of proof with respect to such treatment shall be on the Secretary.

(B) EXCEPTION FOR OTHER REASONABLE BASIS

- In the case of any issue involving whether the taxpayer had a reasonable basis not to treat an individual as an employee for purposes of this section, subparagraph (A) shall only apply for purposes of determining whether the taxpayer meets the requirements of subparagraph (A), (B), or (C) of subsection (a)(2).

(5) PRESERVATION OF PRIOR PERIOD SAFE HARBOR

- If -

(A) an individual would (but for the treatment referred to in subparagraph (B)) be deemed not to be an employee of the taxpayer under subsection (a) for any prior period, and

(B) such individual is treated by the taxpayer as an employee for employment tax purposes for any subsequent period.

then, for purposes of applying such taxes for such prior period with respect to the taxpayer, the individual shall be deemed not to be an employee.

(6) SUBSTANTIALLY SIMILAR POSITION

- For purposes of this section, the determination as to whether an individual holds a position substantially similar to a position held by another individual shall include consideration of the relationship between the taxpayer and such individuals.

[End of Section 530, as amended]

Editor's Note:

1. Section 530(d), added by Section 1706(b) of Pub. L. 99-514, applies to remuneration paid and services rendered after December 31, 1986. Source: Pub. L. 99-514.
2. In general, amendments made by Section 530(e), added by Section 1122 of Pub. L. 104-188 [Small Business Job Protection Act of 1996] shall apply to periods after December 31, 1996. **NOTICE BY INTERNAL REVENUE SERVICE** - Section 530(e)(1) shall apply to audits which commence after December 31, 1996. **BURDEN OF PROOF - IN GENERAL** - Section 530(e)(4) shall apply to disputes involving periods after December 31, 1996; **NO INFERENCE** - Nothing in the amendments made by this section shall be construed to infer the proper treatment of the burden of proof with respect to disputes involving periods before January 1, 1997. Source: Pub. L. 104-188

[[Top](#)]

5 of 7 DOCUMENTS

UNITED STATES CODE SERVICE
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*** CURRENT THROUGH PL. 109-160, APPROVED 12/30/05 ***
*** WITH A GAP OF 109-155 ***

TITLE 26 INTERNAL REVENUE CODE
SUBTITLE C EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX
CHAPTER 25 GENERAL PROVISIONS RELATING TO EMPLOYMENT TAXES AND COLLECTION OF
INCOME TAXES AT SOURCE

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

26 USCS § 3508 (2005)

§ 3508. Treatment of real estate agents and direct sellers

(a) General rule. For purposes of this title, in the case of services performed as a qualified real estate agent or as a direct seller

- (1) the individual performing such services shall not be treated as an employee, and
- (2) the person for whom such services are performed shall not be treated as an employer

(b) Definitions. For purposes of this section

(1) Qualified real estate agent. The term 'qualified real estate agent' means 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

(2) Direct seller. The term "direct seller" means any person if—

- (A) such person
 - (i) is engaged in the trade or business of selling (or soliciting the sale of) consumer products to any buyer on a buy-sell basis, a deposit-commission basis, or any similar basis which the Secretary prescribes by regulations, for resale (by the buyer or any other person) in the home or otherwise than in a permanent retail establishment,
 - (ii) is engaged in the trade or business of selling (or soliciting the sale of) consumer products in the home or otherwise than in a permanent retail establishment, or
 - (iii) is engaged in the trade or business of the delivering or distribution of newspapers or shopping news (including any services directly related to such trade or business),
- (B) substantially all the remuneration (whether or not paid in cash) for the performance of the services described in subparagraph (A) 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 person are performed pursuant to a written contract between such person and the person for whom the services are performed and such contract provides that the person will not be treated as an employee with respect to such services for Federal tax purposes

(3) Coordination with retirement plans for self-employed. This section shall not apply for purposes of subtitle A [26 USCS §§ 1 et seq.] to the extent that the individual is treated as an employee under section 401(c)(1) [26 USCS § 401(c)(1)] (relating to self-employed individuals).

HISTORY:

(Added Sept. 3, 1982, P.L. 97-248, Title II, § 269(a), 96 Stat. 551; Aug. 20, 1996, P.L. 104-188, Title I, § 1118(a), 110 Stat. 1764.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES**Amendments**

In 1996, P.L. 104-188, Sec. 1118(a) (applicable to services performed after 12/31/95, as provided by Sec. 1118(b), which appears as a note to this section), amended subsec. (b)(2)(A) by deleting "or" at the end of cl. (i), inserting "or" at the end of cl. (ii), and adding cl. (iii).

In 1982, P.L. 97-248, Sec. 269(a), added Code Sec. 3508, effective for services performed after 12/31/82.

Other provisions

Rules and regulations. Act Sept. 3, 1982, P.L. 97-248, Title II, § 269(c)(3), 96 Stat. 553, provides: "Nothing in section 530 of the Revenue Act of 1978 [26 USCS § 3401 note] shall be construed to prohibit the implementation of the amendments made by this section [enacting this section, amending 42 USCS § 410 and 26 USCS § 3401 note]."

Application of Aug. 20, 1996 amendments. Act Aug. 20, 1996, P.L. 104-188, Title I, Subtitle A, § 1118(b), 110 Stat. 1764, provides: "The amendments made by this section [amending subsec. (b)(2)(A) of this section] shall apply to services performed after December 31, 1995."

NOTES:**Related Statutes & Rules**

This section is referred to in 42 USCS § 410.

Research Guide**Am. Jur.**

35 Am. Jur. 2d, Federal Tax Enforcement § 163

33A Am. Jur. 2d, Federal Taxation (2005) §§ 9161, 9506, 9516, 9810, 9813

70A Am. Jur. 2d, Social Security and Medicare §§ 286, 288, 289, 291

Labor and Employment

10 Labor and Employment Law (Matthew Bender), ch. 261, Terms, Conditions, Privileges of Employment, and Independent Contractor Status § 261.06

Interpretive Notes and Decisions

1. Generally 2. "Consumer products"

1. Generally

Telemarketers and delivery personnel who market gourmet food products by telephone or personal sales, are compensated solely on commissions and serve under written agreement that they are not treated as employee for employment tax purposes, are direct sellers, it is not necessary that copies of each written contract be produced, and it is sufficient that the taxpayer have samples of contracts and evidence that telemarketers and delivery personnel executed such agreements. *Smoky Mt. Secrets v. United States* (1995, ED Tenn.) 910 F. Supp. 1316, 95-2 USTC ¶ 50573, 76 AFTR 2d 6974, 95 TNT 210-18, reported in full (1995, ED Tenn.) 1995 US Dist LEXIS 20348.

2. "Consumer products"

"Consumer products" for purposes of § 3508 include both tangible consumer goods and intangible consumer services, consumer products include home study educational courses for instruction-by-mail educational institute, accordingly, direct sellers of home study educational courses who meet other § 3508 requirements can be considered independent contractors. *Cleveland Inst. of Electronics v. United States* (1992, ND Ohio) 787 F. Supp. 741, CCH Unemployment Inv. Rep. P 16583A, 92-1 USTC ¶ 50182, 69 AFTR 2d 1015.

Definition of "consumer product" includes both tangible consumer goods and intangible consumer services, and

accordingly persons who sell home study educational courses sell consumer products. *Cleveland Inst. of Electronics v United States* (1992, ND Ohio) 787 F Supp 741, CCH Unemployment Ins Rep P 16583A, 92-1 USTC P 50182, 69 AFTR 2d 1015

Sales personnel who sell cable television subscriptions qualify as direct sellers and are properly treated as independent contractors since cable television subscriptions qualify as consumer products. *R Corp v United States* (1994, MD Fla) CCH Unemployment Ins Rep P 14033B, 94-2 USTC P 50380, 74 AFTR 2d 5620, 94 TNT 156-34, magistrate's recommendation, costs/fees proceeding (1996, MD Fla) 77 AFTR 2d 855

Specialty advertising products, such as pens, key chains, coffee mugs, and like distributed by business as form of advertising are not consumer products since personal or household use of item is subordinate to its purpose of conveying advertising message. *Private Letter Ruling 9143046*

SENATE COMMITTEE REPORT

DATE: 4/7/06

FURTHER: Finance

DATE TURNED
IN TO OFFICE: 4/28/06

Labor and Commerce Committee considered CS FOR HOUSE BILL NO. 409(L&C)

HB 409 NO WORKERS' COMP. FOR REAL EST. LICENSEE

"An Act relating to excluding qualified real estate licensees from workers' compensation coverage."

and recommends:

- be replaced with _____ CS _____ (_____)
- adopt previous _____ CS _____ (_____)
- attached amendment(s)
- adopt Letter of Intent by _____ Committee
- further referral to _____ Committee

CS Senate Bill:
 Same Title
 New Title

SCS House Bill:
 Same Title
 Technical Title Change
 New Title w/ SCR # _____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#
DLWF	2/23/06			✓	2
DCED	2/24/06			✓	1

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	Do PASS	Do NOT PASS	No REC	AMEND
Davis <i>Betty Davis</i>			X	
Ellis <i>[Signature]</i>	X			
Seelins <i>[Signature]</i>	✓			
B. Stevens <i>[Signature]</i>	✓			
Bunde CHAIR: <i>[Signature]</i>	✓			