



The Voice of Real Estate in North Carolina

Are independent contractor agreements necessary?

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QUESTION: I own a real estate brokerage firm. For many years, I have had all of my brokers sign independent contractor agreements at the beginning of each year. The process of preparing these agreements and getting them signed takes a lot of time. Is it an exercise that is necessary?

ANSWER: There are a number of reasons why a well-written independent contractor agreement is strongly recommended. One important reason is that in order to ensure that the brokers affiliated with your firm will not be treated as employees for Federal tax purposes, a written independent contractor agreement is required by Section 3508 of the Internal Revenue Code. Section 3508 states that in the case of services performed as a "qualified real estate agent," the individual performing the services will not be considered an employee, and the person for whom the services are performed will not be treated as an employer. There are three requirements for being a "qualified real estate agent." First, the agent must be licensed. Second, substantially all of the compensation paid to the agent must be directly related to sales (i.e. commission-based) rather than by the hour. Finally, the services must be performed pursuant to a *written* contract which provides that the agent will not be treated as an employee for Federal tax purposes.

Another reason for a written independent contractor agreement is that it will help to reduce future disputes with your brokers. Issues commonly addressed in written independent contractor agreements include, but are not limited to, the calculation of commissions, duties the broker is expected to perform, workers comp insurance, E&O insurance and the management of disputes and litigation, and the handling of commissions, agency agreements, and leads in the event the broker leaves the firm. The relationship between the parties is largely governed by the contract between them rather than a body of statutes or rules. Thus, if there is no written contract or it is poorly drafted, it can be very difficult to analyze the parties' respective rights and obligations in the event of a dispute.

Yet another benefit of a written independent contractor agreement is the protection it can offer a firm in the event of mistakes or misconduct by your agents. Under North Carolina law, employers can be held liable for certain wrongful acts of their employees, but a company is generally not held liable for the wrongful acts of its independent contractors. Courts considering whether a wrongdoer was an employee or an independent contractor generally focus their inquiry on one issue: to what extent did the company have the right to *control* the method and the manner in which the person did their work? A well-crafted independent contractor agreement can address some of these control issues. For example, it can state that the broker shall determine his or her own hours of work. It can require the broker to pay his or her own expenses including MLS fees and license fees. The agreement can give the broker the right to hire assistants at his or her own expense. In the event a broker is accused of some wrongful act or omission, provisions such as these evidence lack of control and should help lessen the likelihood of your firm being held responsible for that conduct.

Finally, there is no requirement that your written independent contractor agreements be re-signed every year. Instead, the agreement can specify a commencement date, and state that it will remain in effect until it is terminated in accordance with a termination clause in the agreement.

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