

KEY PROVISIONS FOR INDEPENDENT CONTRACTOR AGREEMENTS



For brokers who classify their real estate salespeople as independent contractors, having a written independent contractor agreement is a fundamental element of successfully managing this relationship. While the existence of a written agreement is not dispositive as to whether the relationship is in reality that of an independent contractor, a written agreement not only adds important protections for the broker, but is frequently a required element of various state law tests, as well as a required element of certain federal law tests, for determining independent contractor status. In addition, courts take the existence of a written agreement into consideration in analyzing whether an independent contractor relationship existed between the parties. For these reasons, be sure to always have a written independent contractor agreement in place at the outset of any such relationship.

WITH THIS IN MIND, CONSIDER THESE HELPFUL PROVISIONS FOR YOUR INDEPENDENT CONTRACTOR AGREEMENTS:

Independent Contractor Relationship

The independent contractor provision states that the relationship between the parties is that of an independent contractor, that the agreement does not create an employment relationship, and that under no circumstances is the independent contractor an agent of the company for which they provide services.

Freedom from Control

It is helpful to include a provision that expressly states that the independent contractor has the right and freedom to work the hours that he or she deems necessary in order to perform the work under the agreement, and that the manner and method of performing the duties and services under the agreement is under the exclusive control of the independent contractor.

Nonemployee for Federal Tax Purposes

Be sure to include a provision that specifically states that the real estate salesperson will not be treated as an employee for federal tax purposes. Inclusion of this provision in the written independent contractor agreement is one of the required elements of meeting the IRS definition of "Statutory nonemployee" in order to properly treat real estate salespeople as self-employed for federal tax purposes.

Commission-based Compensation

Real estate salespersons classified as independent contractors should be paid based on their sales output or some other performance measure, and should never be paid based on number of hours worked. Compensation based on sales output is one of the required elements of meeting the IRS definition of "Statutory nonemployee" in order to properly treat real estate salespeople as self-employed for federal tax purposes. In addition, compensation based on sales output is frequently an element used in state law independent contractor tests for real estate salespeople.

Equipment, Supplies and Expenses

The real estate salesperson should be responsible for paying their own business expenses as they relate to provision of the services under the independent contractor agreement, such as computers, phones, office space and vehicles. One of the hallmarks of an independent contractor relationship is that the independent contractor has an investment in the equipment used to perform their services.

Insurance

An insurance provision clearly states that it is the real estate salesperson's responsibility to maintain, at their own expense, any necessary insurance, such as automobile, public liability, property damage and commercial general liability insurance.

No Employee Benefits

Independent contractors should not receive any employee benefits, so it's helpful to include a provision that expressly states that the real estate salesperson is not eligible to participate in any employee benefits or programs that the broker may provide to its employees, including but not limited to, health insurance, workers compensation, retirement, vacation or sick leave.

Mandatory Arbitration and Class Action Waiver

A mandatory arbitration and class action waiver clause is an effective way to mitigate the risks and costs associated with litigation. In fact, these provisions have been upheld in recent litigation involving the issue of worker classification of real estate salespeople.