

ADVISORY LETTER FROM WYOMING ASSOCIATION OF REALTORS® COUNSEL

SUBJECT: REAL ESTATE SALESPERSONS AND UNEMPLOYMENT INSURANCE AND
WORKER'S COMPENSATION COVERAGE

Disclaimer: Please be advised that the following does not constitute an official ruling by the State of Wyoming of the regulations and opinions set forth below. The information contained in this Advisory Letter is for use of members of the Wyoming Association of Realtors. The application and impact of opinions and guidance set forth can vary widely based on the specific facts involved. While Wyoming Association of Realtors have made very attempt to ensure that the information contained in this letter is accurate, Wyoming Association of Realtors or the State of Wyoming is not responsible for any errors or omissions and any individual member shall be advised to consult their legal counsel.

Issue: Classification of Realtors/Salespersons by State of Wyoming Workforce Services as employees for the purposes of unemployment insurance (UI) and Worker's Compensation(WC) and therefore obligation of broker to pay into funds based upon rating.

Background

A meeting with John Cox, Director, John Ysebaert, Deputy Director, and Tobi Cates, occurred on February 6, 2017 in Cheyenne, Wyoming with representatives of Wyoming Association of Realtors. At the meeting a fruitful and open discussion occurred about the recent opinion of the Department, as well as the AG, on classification of salespersons as employees when they receive income that is not solely commission based for the sale of real property such as Market Analysis fees or sales of non-real property.

A. INDEPENDENT CONTRACTOR

As a result of the meeting, it was made clear that the salespersons/licensees are not independent contractors for the sake of classification as exempt employees. Many of the licensees are under Independent Contractor agreements with the Broker/ Brokerage. Obviously, if they are Independent Contractors they would be exempt. The Wyoming Statutes excludes from Workers Compensation: "*Any individual engaged as an independent contractor.*" W.S. 27-14-102(a)(vii)(D). The important issue is whether the individual is truly an Independent Contractor. An independent contractor is defined by the Wyoming Statutes as an individual who performs services for another individual or entity and:

(A) Is free from control or direction over the details of the performance of services by contract and by fact;

(B) Repealed;

(C) Represents his services to the public as a self-employed individual or an independent contractor; and

(D) May substitute another person to perform his duties.

W.S. 27-14-102(a)(xxiii). On the Unemployment side, the Wyoming Employment Security Law covering unemployment insurance contains similar wording W.S. 27-3-104 (b).

As most licensees do not meet this simple three prong test, they are not considered independent contractors by the State of Wyoming Workforce Services. There is a more detailed analysis for federal income tax purposes which allows many of the licensees to be deemed independent contractors for federal tax purposes. However, the State of Wyoming, in reviewing the licensees have deemed them employees. The main review by the State of Wyoming has been how most licensee's actually represent themselves to the public (not as independent contractors but directly associated with a Broker) and that a Licensee can't substitute any person into the transaction. Under the substitution prong, a Licensee would be allowed to have any other Licensee perform their duties even if from another Brokerage House or Broker. In addition, the State of Wyoming has issues with direction and control of performance of the individual licensees. It would be difficult for a licensee working under a broker to qualify as an independent contractor under W.S. 27-14-102(a)(xxiii) or 27-3-104(b).

B. REAL ESTATE LICENSEE EXEMPTION

However, there is an exemption in both Workers Compensation and Unemployment Insurance for employees in the real estate industry. **An employee is someone engaged in employment under any contract for hire, unless he or she is a licensed real estate broker or sales person receiving as sole compensation a commission based on the sale or rental of real estate.**

This is the exemption that the majority of licensees fall under during the normal course of business. There are two major issue that must be considered in the exemption analysis: 1) no part of the compensation can include any non-commission revenue including payments for market analysis; and 2) any commission payments must be solely on the sale of or rental of real estate so it can't be associated with an asset purchase sale or the sale of a trailer that is not considered real property.

SOLUTION

A. SEPARATE OUT COMMISSION v. NON-COMMISSION.

The solution to this issue is to have each licensee set up a single member limited liability company (LLC). The licensee would continue individually on all commission based sales associated with real estate. However, for any actions not commission based or commission based for the sale of non-real estate (asset sales/trailer sales), the services would be provided by the LLC and paid to the LLC. Under W.S.

27-14-102(vii)(P) an employee does not include “A *member of a limited liability company*” [see also W.S. 27-3-108 (a)(vii)]. Therefore, if the services were provided by the LLC and payment for all non-commission based income for items like market analysis or commission based for asset sales were made to the LLC, that transaction would be exempt from Worker’s Compensation and Unemployment Insurance.

The Broker would have to have two separate systems of recording of revenues and payment of income and ensure the proper payments to the proper individual or LLC. If the Broker is concerned about mixing the two issues, a Broker could pay the LLC for all services provided by the licensee.

This action would be a forward-looking solution but the Department is not actively seeking retroactive correction of this situation unless the Broker is audited. This is a long-term solution to address a recent audit by the State of Wyoming of one of our members.

IF YOU HAVE ANY FURTHER QUESTIONS - PLEASE CONSULT WITH YOUR ACCOUNTING AND LEGAL PROFESSIONALS.