

OPINION

Is independent contractor status for real estate agents coming to an end?

If passed, the PRO Act would make the 'ABC' test for independent contractor status the law of the land and would classify most real estate professionals and almost all other gig workers as employees



BY [BERNICE ROSS](#)
March 16, 2021

On March 9, 2021, the House of Representatives [passed H.R. 842](#) (the PRO Act) amending the 1935 National Labor Relations Act (NLRA), and [President Joe Biden](#) strongly urged the Senate to also pass the measure.

If passed, the PRO Act would make the “ABC” test for [independent contractor](#)(IC) status the law of the land and would classify real estate professionals and almost all other gig workers as employees. The new law would go into effect on Jan. 1, 2023.

IC status in real estate has been under attack in the courts for years. The primary reason is due to the numerous conflicting laws as to what constitutes IC status. For example, at the federal level, the definition of IC status for tax purposes is different from the definition in the National Labor Relations Act (NLRA).

Complicating matters even further, states have conflicting laws as well. In [California](#), this led to the California Supreme Court [Dynamex Decision](#) that upheld Assembly Bill replacing the Borello test that most California companies used to classify ICs with the so-called “ABC” test. (California is currently operating under Borello.)

Lobbying by the California Association of Realtors led to a carve out from the legislature for Realtors. In November 2020, [California voters passed](#) Proposition 22 that allowed Lyft and Uber drivers to remain as ICs as well.

Provisions of the PRO Act that eliminate IC status for Realtors and gig workers

[The PRO Act seeks](#) to expand “various labor protections related to employees’ rights to organize and collectively bargain in the workplace” and weaken “right to work” laws which exist in 27 states.

The language (i.e. the “ABC” test) specifically impacting IC status for real estate professionals and [other gig workers states](#):

An individual performing any service shall be considered an employee (except as provided in the previous sentence) and not an independent contractor, unless—

“(A) the individual is free from control and direction in connection with the performance of the service, both under the contract for the performance of service and in fact;

(B) the service is performed outside the usual course of the business of the employer; and

(C) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.”

According to an analysis by Littler, a law firm specializing in labor and employment law:

Through the PRO Act, Congress seeks to decide “once and for all” at the federal level the independent contractor versus employee classification issue. Implementing the ABC test through the PRO Act would compel employers to terminate independent contractor relationships or submit to the added burdens of converting independent contractors to regular employees despite the preference of many contractors to remain independent.

The biggest issue for real estate is “B.” According to [the *National Law Review*](#) in its analysis of California’s Dynamex Decision and the implementation of the “ABC” test in California:

Note that each of these requirements need to be met in order for the presumption that a worker is an employee can be rebutted, and for a court to recognize that a worker has been properly classified as an independent contractor. Prong B of the ABC test is particularly notable because it seemingly precludes businesses from using independent contractors to deliver or provide their core product or service.

In other words, “B” says that if you’re a real estate agent who works for a broker whose primary business is selling real estate, you must be an employee. (For a more in-depth analysis of the other provisions in the PRO Act, [visit JD Supra.](#))

Where the real fight will be

Michael Lissack, the managing broker for The Virtual Realty Group in Oregon and Washington and has been involved in a number of labor claims and litigation regarding violations of the existing IC laws in multiple states. Lissack believes the odds the bill will pass the Senate are about 60-40:

“The PRO Act will pass if the Democrats can persuade 10 Republican Senators to override any filibuster of the bill. The ABC Test does not even register on the Senate’s priority list. Instead, the Republicans will probably pursue making changes in the right-to-work provisions that would be eliminated in 27 states.

“The PRO Act would be highly likely to pass if it was tied to revising the Section 230 provisions that limit the civil liability of big tech companies resulting from external content published on their servers. The most notable examples are Facebook and Twitter.”

While the Republicans are eager to make changes in Section 230, even that pales in comparison with the upcoming fights over immigration and tax increases. Lissack is right: The ABC test is not even on the radar of what matters most.

In contrast to Lissack’s opinion, an analysis by JD Supra, a law firm that provides information to the legal community, legal consumers, media and [general public](#), [stated](#): “As proposed, the PRO Act remains unlikely to win Senate approval this year.”

The operative words are “as proposed,” hence Lissack’s comments about the potential for the Democrats and Republicans negotiating some sort of compromise.

What’s ahead if the PRO Act becomes law

According to NAR, 87 percent of all Realtors are independent contractors, and only 5 percent are employees. If real estate agents must shift to becoming employees, they will be entitled to a minimum wage, expense reimbursements, employee benefits, rest breaks, vacations and other benefits afforded to employees under federal/state law.

It also means they will be subject a new set of standards regarding how, when and where they perform their work.

10 changes to expect if the PRO Act becomes law

1. The industry will have a consistent federal standard with respect to how the labor laws apply to brokers and agents. State lawmakers will no longer be able to carve out exceptions to the IC laws as they have done in the past.
2. The PRO Act only applies to agents who are not brokers and/or who are not incorporated (i.e., are operating as an LLC or S corporation). Agents who are incorporated are functioning in a business-to-business (B2B) relationship. If they have a broker’s license and their license is hanging at a brokerage that goes out of business, they always have the option of continuing their business as an independent broker.
3. To become a full-time employee, agents who are not brokers or who are not incorporated will have to produce enough income to pay them the minimum wage in their state plus benefits and a profit for their broker.

For example, at \$15 per hour for minimum wage, that would be \$30,000 per year *plus* vacation time, sick leave and the 6.2 percent employers must pay in social security benefits. Covering all those costs could easily be in the \$45,000 to \$50,000 range, and that’s with zero profit for the broker.

According to NAR, in 2019 the median income for Realtors was \$49,700. Consequently, at least half the current Realtor population wouldn't make the cut for full-time employment.

4. Agents who do become employees can expect major changes in what's required of them. These may include:

- Required training, mandatory meetings and increased supervision.
- More rigorous control over the customer experience with incentives tied to customer ratings.
- Quotas and bonuses based on production and reviews.
- More part-time employees compensated on an hourly basis who will handle specific tasks such as open houses, conducting buyer showings, prospecting, etc.

5. The PRO Act will disrupt brokerage revenue models, especially those who rely primarily on desk fees or high agent count. These companies will have to make major changes in their current revenue models if they hope to survive.

6. Solo practitioner brokerages and team models will explode as agents seek to retain their independence and control their own businesses.

7. The trend towards outsourcing work to virtual assistants will also explode, especially for companies already providing these services to the real estate industry and for freelancing companies like Odesk that brokers can hire on a B2B basis.

8. Due to decreased membership, NAR, state and local associations will have less political clout. The decline in revenue may also result in a dues increase coupled with fewer resources for consumers and Realtor members.

9. Due to the decline in the number of agents, many Multiple Listing Services will be forced out of business or forced to merge. This will hasten the move to larger regional MLSs in order for them to survive.

10. The portals and vendors that have contracted with large companies or Realtor associations will experience a drop in their income commensurate with the decline in agent count. This will result in additional disruption as systems and products agents and brokers relied upon may no longer be available.

Will real estate dodge the loss of IC status once again?

So far the industry has dodged losing IC status. If the PRO Act does pass, the months leading up to Jan. 1, 2023 will be highly disruptive. Nevertheless, as one of my friends who is in high tech once observed, “America is the great workaround society.”

We figured out how to work around COVID-19. The industry’s entrepreneurial spirit and determination will figure out how to make things work no matter what the politicians ultimately decide to do.

Bernice Ross, President and CEO of [BrokerageUP](#) and [RealEstateCoach.com](#), is a national speaker, author and trainer with over 1,000 published articles. Learn about her broker/manager training programs designed for women, by women, at [BrokerageUp.com](#) and her new agent sales training at [RealEstateCoach.com/newagent](#).

TOPICS: [agent advice](#) | [Bernice Ross](#) | [coronavirus](#)

[Hide Comments](#)

COMMENTS



TOPICS: [agent advice](#) | [Bernice Ross](#) | [coronavirus](#)

[Hide Comments](#)

COMMENTS

18 Comments

Sort by Oldest



Add a comment...



David Weitzel

All for it, I'm an employee of my own S-corp and plan on hiring people. Frankly I'm feedup with Brokers hiding gross incompetence behind IC's saying hey we cannot force them to learn or be professional...

Like · Reply · 6 · 5d



Vern McHargue

Brokers should still be free to choose incompetence if that's how they want to run their biz - competitive forces will squash such decisions better than government can - amazed that people in business don't recognize the erosion of business freedom from such a thing as this



Philip Nispon

you will be broke as real estate continues to go into commodity status and commissions reduce to near zero . Good luck with employment in a contract world

Like · Reply · 1d



Tim Harris

SOOO....if this passes (probably won't...TEN Republican Senators have to vote for it) every agent would form a corporation and they would be employees of their own corps. Probably a smart move regardless.

Like · Reply · 5 · 4d



Bernice Ross

David and Tim, agreed--the work around is to become a LLC or S-Corp, whatever your state requires. This would probably wash out non-productive agents or those who aren't prepared to go through the process of incorporating.

Like · Reply · 5 · 4d



Cherie DeMurley Harrison

Bernice I had not thought about that washing out other Agents. Also it might help with our commission. Here is Houston Foreigners want 1.% - 2% of our and those are BUYERS. If we don't cave they just go to one of their piers who has a primary Job and only does realestate for family and friends and those people family and friends. A huge part of market if foreign.

Like · Reply · 4d



Brian Pate

Cherie DeMurley Harrison Wow! You managed to violate Fair Housing laws and Anti-Trust laws in 2 sentences. You should probably delete your comment.

Like · Reply · 14 · 4d



Lauren Keifer Eason

Brian Pate Zillow violates both and others it all the time. When are they going to be held accountable?

Like · Reply · 2 · 4d

[Show 1 more reply in this thread](#)



Joe Manning

From my role, it will be fun to setup a training experience and set a standard of service and understanding of tools. We currenty measure adoption of everything we launch and if we were on a (successful) employee model, adoption should be very high.

We might even see more in-house Tom Ferry types arise.

Like · Reply · 2 · 4d



Jim Weix

When I sold my brokerage firm to a larger one, and also went to work for them as an IC, I



Bernice Ross

Jim--thanks for sharing a work-around that most agents and brokers could probably implement.

Like · Reply · 4d



Cory L. Kammerdiener

Many Agent-Centric broker models that are about that MLM and collecting agent fees as part of the Franchise Agreement are screwed! As a Mortgage Broker Owner, we are required to hire Mortgage Loan Originators as W2 Employees who work similar to real estate agents. The real estate broker industry is about to come in line with the mortgage industry. I stopped hiring IC Agents 2 years ago and only hiring W2 Agents. Best business decision we ever made at the brokerage.

Like · Reply · 1 · 4d



Jonathan Steingraber

I dont think this means that the S-Corp would automatically exclude you. It would probably mean that you need to be your own broker. Corporations technically are not licensed entities for real estate as far as I understand it so not sure it would hold up. If you are a broker and operate independently then yes but then you need to meet the state requirements which would thin the heard A LOT. I like the idea of this passing.

Like · Reply · 2 · 4d



Jim Weix

Might want to check your state rules. In Florida many real estate agents are a Sub-S corp. The "P.A." after your name sets you apart from the average agent.

Like · Reply · 1 · 4d



Bernice Ross

As an S-Corp or LLC, you can contract with your broker on a B2B basis. The broker still could meet the supervisory requirements--the details would have to be worked out, but it shouldn't be that difficult.

Like · Reply · 4d



Larry DeBerry

This is definitely very interesting especially when it comes to teams. If a team is a sub-s and you have IC's who have contracted with you on your team they will become employees as I understand it under this proposal. Unless they too are a sub-s as well. Is that correct or did I miss something?

Like · Reply · 1 · 4d



Jonathan Sanders

This article is off the mark and is typical of the type of fear mongering we see nationwide with respect to the independent contractor vs. employee "debate."

Under the ABC test, the biggest issue for real estate is NOT "B"; it's "A," as it is in just about any other industry. If a brokerage treats its agents as employees with requirements as to working hours, working location, and which listings to handle as a buying or selling agent, then the agents should be entitled to the benefits of employee status.

If a brokerage doesn't want to risk having its agents classified as employees for whatever purpose

Like · Reply · 2 · 4d



Holly O'Driscoll

Interesting ... and "A" might be the test that excludes Real Estate Agents from the test. Most of us set our own hours and choose whether we work from home offices or in the brokerage office. If this A is the metric, the rest of the article's premise becomes moot.

Like · Reply · 3 · 3d · Edited



Jonathan Sanders

Holly O'Driscoll precisely. All of the factors are applied in any analysis, but "A" is where the meat is. This is repeatedly overlooked in the vast majority of discussions about employee-independent classification.

Like · Reply · 1 · 4d



Bernice Ross

Jonathan--this was reviewed by Inman's legal staff and I have been speaking in front of associations and companies on this topic since 2014 and wrote the chapters for the Swanepoel Trends Report on this back in 2015 as well. It's "B" that is the big issue. A broker's regular course of business is selling real estate. Hence the employee model if this becomes federal. Also, there has been a lot of litigation both inside and outside real estate on this issue. (Check Barsasini in CA, Monnell in MA) plus Labor Department judgments against people like FedEx (over \$200 million.)

Like · Reply · 2 · 4d

[Show 3 more replies in this thread](#)



Miranda Buchta-Zuege

I love being an IC. My income is based on the effort I put in and service I provide. The reason I left corporate America was to have my own business and not have a boss. The issue I see if this passes is the disservice to consumers it may bring. Companies don't like to pay overtime, so as employees, you will have a set schedule of 40 hrs a week. Who presents to my clients that I built a relationship with when an offer comes in after my shift and I have the next day off? Do buyers schedule showings through the broker and get whoever is available during that shift? What if you show a house and they want to write an offer but your shift is ending? Consumers like the tailored service they get from one agent or a team. Passing them around does not feel like top notch service.

Like · Reply · 5 · 4d



Bernice Ross

Miranda--please check out the difference between exempt and unexempt employees. An exempt employee is paid a salary, not hourly. <https://www.indeed.com/.../exempt-vs-non-exempt-employee...>

Like · Reply · 4d



Miranda Buchta-Zuege

Bernice Ross That is if the broker decides to go the route of salary versus hourly. The article discussed an example of hourly. Even if this passes and a broker opts to offer salary,

separates the average from the great. In order to command top dollar, receive repeat and referral business, it comes down to the knowledge and service you provide. Prior to real estate, I worked for a retailer that had commissioned salespeople. Those who didn't make it had terrible customer service skills and therefore not enough sales. A few would occasionally rise to the challenge and work on their skillset to become better.

Like · Reply · 2 · 4d



Tni LeBlanc, Realtor, JD

Bernice Ross In California, the test for exemption is pretty strict, some supervisors or professionals in a recognized profession would qualify to be salaried and exempt from overtime. Currently, it's a pretty high bar. I know there are some employers that are using the exemption for employees, but many if tested in court, would likely lose the issue.

Like · Reply · 3d

[Show 1 more reply in this thread](#)



Vern McHargue

Anyone ever run an HR dept, reported to DOL, etc.? Trust me, you do not want this erosion of freedom, whether employer or sole proprietor. Industry is more attractive (and stronger) when we have more choices (freedom), not less.

Like · Reply · 5 · 4d



Cindy Quade

I think its a disaster waiting to . The true effect will cost the public dearly. I have a small brokerage. I am in no way going to turn my agents into employees. I have 2 full time now. That will put me well over 5 that protects me from costly mandatory employee benefits above and beyond what I already do. And forget about mileage and tracking that! I will need a full time accounting department. How many small team brokerages will form. The work around? I can think of one, but would have the flush it out.

Like · Reply · 2 · 4d



Charles Mader, Broker

The solution is simple: Make your Office All-Broker and revert salespeople back to their assistant status.

Like · Reply · 2 · 4d



Pete Thorpe

So basically.... become an employee for Zillow/Redfin, become your own broker, or become unemployed...

Like · Reply · 3 · 4d



Jeff Bransford

I see several possibilites if this happens. I suspect brokerages would become smaller. Brokers won't be able to afford marginal producers on salary. It would be create a barrier for new people to enter the business. Agents who qualify may set up their own brokerage company so they can act independently without having to worry about labor issues.

Like · Reply · 3 · 4d

Check your own states laws. I can Incorporate my Florida Sales Person License but my Michigan Sales Person License CAN NOT be Incororated in any way. In these States, you will have to get a Brokers Lincnese to Incorpatate and in all States, there can only be One Broker of Record so you cant work for a Broker as an IC in those states that dont allow you to incorporate a Sales Persons License. I would think that there would be lots of new Brokerages with the Broker being the only licensee if this ever passes.

Like · Reply · 2 · 3d



Frank Reali

Wow, alot of work arounds. Lets just figure only 20% of the present licensees will survive regardless of LLC's. Maybe more single to three person Brokerages and a limited number of mega-companies who can aford to float salaries especially in those areas where closing, due to various items not related to Real Estate Professionals, take upwards of three months to close.

It will be an interesting time. Unsure, with everything else on their plates if our legislators will care about ending IC status as it has positive implications to income, state and local taxes.

Like · Reply · 1 · 3d



RoseAnn C. Spalt

Aren't there enough people with their hands in our pockets for a piece of our action, now unions are added to the lot?

Like · Reply · 1d

Facebook Comments Plugin

Sign up for Inman's Morning Headlines

What you need to know to start your day with all the latest industry developments

mel@vbr.net

Sign me up

•
[About](#)
[Contact](#)
[Support](#)
[Advertise](#)
[Sponsor Connect](#)
[Careers](#)
[Code of Conduct](#)
[Privacy](#)
[Terms of Use](#)

[Email Newsletters](#)

[The Wrap](#)
[Essential Guides](#)
[Connect Video](#)

Community

[Facebook Groups](#) [Contributor submissions](#)

- [Coast to Coast](#) [Image submissions](#)
- [Agent to Agent](#) [Awards](#)
- [Broker to Broker](#)
 - [Inman Innovators](#)
- [Vendor to Vendor](#)
 - [Inman 101](#)
 - [Inman Influencers](#)