

Worker Classification: A Pre- and Post-COVID-19 Challenge for Real Estate Industry

By Michael A. Griffin

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Meet the Authors



Michael A. Griffin

Office Managing Principal and
Office Litigation Manager
(206) 626-6416
Michael.Griffin@jacksonlewis.com

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While some say “COVID-19 has changed everything,” a couple of issues for real estate employers are unchanged. First, in the brokerage world, properly classifying agents as independent contractors, instead of employees, remains a concern, particularly as more states adopt some version of California’s employee-centered independent contractor analysis, the “ABC” test. Second, ensuring that employees who are correctly classified as non-exempt employees track their time. COVID-19 has made this problem worse because of the telework boom.

Contractor vs. Employee

The ABC test for determining independent contractor status, first adopted by the California [Supreme Court in 2018](#) and later [codified as Assembly Bill 5 \(AB 5\)](#), is the strictest standard adopted to date. To qualify as an independent contractor, it requires that the worker:

- A. Is free from the control and direction of the company in connection with the performance of the work;
- B. Performs work outside the usual course of the company’s business; and
- C. Is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

The presumption under the ABC test is that a worker is an employee. Therefore, the employer has the burden to prove otherwise.

Significantly, AB 5 carved out an exception for real estate agents. While many states have adopted some aspect of the ABC test, real estate agents are typically carved out. Thus, generally, absent a state law to the contrary, the familiar three-part IRS test is applicable:

1. The worker must be a *licensed* real estate professional;
2. “Substantially all” of the worker’s pay must be *directly related to sales*, not hours worked; and
3. There must be a *written contract* stating that the worker will not be treated as an employee for federal tax purposes.

But the “absent state law to the contrary” caveat is important, as independent contractor status varies widely by state. For example, in Washington state, where the full ABC test is making its way through the state legislature, there is no express carve out. Additionally, the independent contractor test for worker’s compensation involves a two-step process that first asks about personal labor. If the worker fails that test, there is a six-part test that incorporates aspects of the ABC test.

Real estate brokers should be familiar with their respective state’s independent contractor

tests and understand whether agents are expressly carved out, as they have been in California.

Teleworking for Non-Exempt Real Estate Employees

The COVID-19-inspired (and often mandated) teleworking boom has exacerbated an existing issue for real estate employers: tracking the hours worked by non-exempt teleworking employees.

Even before COVID-19 sent many office workers home, employers were increasingly permitting telework for many reasons, including increased acceptance of teleworking as a disability accommodation and employer-initiated efforts to raise employee satisfaction and engagement.

Naturally, when it comes to non-exempt employees, it is essential for employers to properly track and pay for all hours worked. This was more manageable when a relatively small number of employees worked remotely. With a large percentage of non-exempt employees working remotely, manageability is harder.

Whether using a software-based system (desktop or mobile) or a traditional hand-written timesheet submission system, real estate employers should consider examining their time-tracking system to determine how well it is working. Questions to ask include: Have any disputes arisen? If so, in what areas of the company or country? Are issues arising from underpayment of regular hours or is this an overtime problem? What about allegedly missed meal and rest periods?

Remote working will stick around in some form post-COVID-19, likely not at the current level, but almost certainly at a higher level than pre-COVID-19. It is therefore critical for employers to get their time-tracking in order to minimize the risk of wage and hour disputes. There is no better time than the present for real estate employers to examine classification of independent contractors and ensure that properly classified non-exempt employees track their time accurately and are paid for all hours worked.

If you have questions or need assistance, please reach out to the Jackson Lewis attorney with whom you regularly work.

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