

19
89 | **OVER**
TWENTY
FIVE
YEARS



Law: Are agents, brokers and salespersons independent contractors? - by Lisa Casa

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An administrative law judge with the New York State Unemployment Board recently found that drivers for Uber were improperly classified as independent contractors, when they were in fact employees, and found that the three drivers seeking unemployment benefits, and all

similarly situated drivers, are entitled to unemployment benefits going back to January 1, 2014.¹ This recent decision highlights a question that frequently plagues real estate firms whether brokers, real estate agents and/or salespersons has been properly classified as an independent contractor. When confronted with this issue, courts and administrative agencies engage in a fact specific inquiry to determine whether an agent, broker and/or salesperson has been properly classified as an independent contractor.

When determining whether an agent, broker and/or salesperson is an independent contractor, courts and administrative agencies utilize what is known as the “economic realities test.” Not one factor is determinative and the ultimate determination will depend on the totality of the circumstances. Factors that have been considered by courts are:

Whether the alleged employer:

1. Had the power to hire and fire the employees;
2. Supervised and controlled employee work schedules or conditions of employment;
3. Determined the rate and method of payment; and
4. Maintained employment records.²

Some practices that may facilitate an independent contractor finding is having separate written agreement with the independent contractor, which clearly spells out the terms of the relationship, including the duration, expectations for each assignment, and payment terms. Also, independent contractors should be paid by 1099, with no taxes or deductions taken out. Additionally, independent contractors should obtain their own benefits, including health insurance and workers’ compensation.

If a court or administrative agency determines that an independent contractor is in fact an employee, the court or administrative agency will treat the independent contractor as an employee and award the independent contractor the same rights and benefits provided to

employees, regardless of the label given by the employer. These rights include, but are not limited to: (a) minimum wage and overtime pay as required by the New York Labor Law and Fair Labor Standards Act; (b) workers' compensation; (c) leave rights under the Family Medical Leave Act and New York City Earned Sick Leave Act; (d) unemployment benefits; and (e) standing to pursue claims for discrimination, retaliation and/or harassment under federal, state and local laws, including, but not limited to, Title VII, the New York State Executive Law, and New York City Administrative Code. Accordingly, the cost of misclassifying an agent, broker and/or salesperson as an independent contractor can be very high, as many of these statutes allow misclassified employees to seek unpaid wages and benefits going back between two and six years, depending on the statute, as well as liquidated damages, pre-judgment interest, and attorneys' fees.

1 Josefa Velasquez, "Administrative Law Judge Says Uber Drivers are Employees, Not Contractors," New York Law Journal (14 June 2017).

2 *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999)

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