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Title 22@ Social Security

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Division 1@ Employment Development Department

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Subdivision 1@ Director of Employment Development

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Division 2.5@ WITHHOLDING TAX ON WAGES

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Chapter 1@ GENERAL PROVISIONS

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Section 4304-2@ Specific Application of Rules for Determination of Employment Status to Circumstances in the

4304-2 Specific Application of Rules for Determination of Employment Status to Circumstances in the Real Estate Industry

(a)

While determinations of whether a salesperson is an employee or an independent contractor in the real estate industry will be determined generally by the rules set forth in Section 4304-1, specific application of those rules to circumstances in the real estate industry are set forth in Section 4304-2. In circumstances where a specific application is not interpreted by Section 4304.2, that specific application will be determined by the rules set forth in Section 4304-1. No one or more of enumerated factors will necessarily indicate that a particular relationship exists.

(b)

Definitions: (1) A "broker" is a person licensed as a real estate broker under the laws of this state and who engages the services of salespersons or a salesperson to perform services in the business which the broker conducts under the authority of his or her license. (2) A "salesperson" is a person who is engaged by a broker to perform services, which may be continuous in nature, as a real estate salesperson under an agreement with a broker regardless of whether the person is licensed as a real estate salesperson or a real estate broker under the laws of this state. (3) "Presumed" or "presumption" as used in this regulation means a presumption affecting the burden of proof as defined in Section 605 of the Evidence Code. (4)

"Licensed activity" means that activity for which a license is required under Section 10131 through 10131.7 of the Business and Professions Code.

(1)

A "broker" is a person licensed as a real estate broker under the laws of this state and who engages the services of salespersons or a salesperson to perform services in the business which the broker conducts under the authority of his or her license.

(2)

A "salesperson" is a person who is engaged by a broker to perform services, which may be continuous in nature, as a real estate salesperson under an agreement with a broker regardless of whether the person is licensed as a real estate salesperson or a real estate broker under the laws of this state.

(3)

"Presumed" or "presumption" as used in this regulation means a presumption affecting the burden of proof as defined in Section 605 of the Evidence Code.

(4)

"Licensed activity" means that activity for which a license is required under Section 10131 through 10131.7 of the Business and Professions Code.

(c)

Basic Guidelines: (1) Written contracts and agreements. Regulations of the Real Estate Commissioner provide that every broker will have a written agreement with each of its salespersons. Generally, when a broker and a salesperson agree to be employer and employee, an "employee contract" is signed, and when a broker and the salesperson agree to be independent contractors, an "independent contractor agreement" is signed. When an employment agreement is signed, it will be evidence of the intent of the parties. However, if the terms of the agreement are not complied with in practice, the agreement shall not determine the relationship of

the parties to the agreement. (2) Broker's policies. Since the Business and Professions Code and regulations of the Real Estate Commissioner require the broker to insure that the rights of the parties to a real estate transaction are protected and that agreements affecting such rights be reviewed by the broker, it is expected that each broker will have certain policies which are intended to protect the parties to a transaction and which must be binding upon all salespersons engaged by the broker. Such policies, including the selection of forms by the broker, shall be considered as would any other fact in determining if an employment relationship exists between the broker and salesperson. Such policies alone, however, will not establish the right to control the manner and means of performing services necessary for a determination that an employment relationship exists. However, brokers' policies relating to the manner and means of performing services that extend beyond those necessary to ensure satisfaction of statutory and regulatory requirements shall be evidence of the exercise of a right to control the manner and means by which a salesperson performs services. Contract provisions, or policies which lend themselves to the increase of business, profits, or sales activity will not be considered necessary to satisfy statutory or regulatory requirements. Such provisions would include, but not be limited to fees, time, solicitation, acquisition of listings, closures, floor time, termination, business licenses, fidelity bonds, automobile insurance, expenses, business cards, advertising, secretarial help, educational requirements, training, office and desk space. Such policies shall be construed as provided in this regulation. Policies relating to ethical standards required of persons in the real estate industry shall be considered as part of the statutory and regulatory requirements going to the end result of the services performed rather than the manner and means by which they will be performed. (3) Assignments other than licensed activities. If a salesperson

is expected, by the broker, to fulfill assignments other than licensed activities or functions incidental thereto, it will be evidence of an employment relationship. Such assignments may involve public relations, tours, office duty, floor time, open house, phone solicitation, making deliveries, or making reports other than as required by law. (4) Educational requirements, training and skills. Since an independent contractor is supposed to be a person in business for himself or herself, it would not normally be necessary to train that person to perform the functions of that person's business, nor would it appear appropriate for a broker to require another independent businessman to seek any particular educational requirements. Therefore, any requirements in that regard will be looked on as evidence of employment. However, voluntary attendance at broker-provided training would not be evidence of employment. (5) Office and desk space. While a broker may allow an independent salesperson to use office facilities, other than incidental use of such facilities on a voluntary basis will be evidence of employment. Of particular significance, would be assigned desks or support personnel, such as secretarial and clerical help, continuing mail box or basket or other receptacle, continuing use of transcription or typewriting or duplicating facilities, or telephone facilities. Payment to the broker by the independent salesperson for the use of office facilities and desk space will only be considered evidence of an independent relationship if the charge by the broker bears a reasonable relationship to the actual value of the facilities used by the independent salesperson. (6) Business cards and advertising. Recognizing that statutes and regulations require that salespersons perform their services in the name of a broker, the fact that the broker's name appears on business cards used by a salesperson and advertising in the name of the broker will not be considered evidence of an employment relationship. However, if the salesperson's name does

not appear on the business cards or the business cards are supplied to the salesperson by the broker without a reasonable charge to the salesperson, such cards will be considered evidence of an employment relationship. A salesperson may advertise for purposes of his or her licensed activity at his or her own expense or by cost sharing with a broker without raising an inference of employment. (7)

Floor time. Assignment of floor time will be considered evidence of an employment relationship. Recognizing that it is to the economic advantage of a broker to allow independent salespersons to spend time on the facilities or premises of the broker, floor time will not be considered evidence of an employment relationship if it is allowed by the broker on a voluntary basis and allowed at the sole discretion of the independent salesperson. However, evidence that a salesperson is expected by the broker to perform floor time or that the relationship of the salesperson to the broker would be terminated for not performing some floor time will be evidence of employment. Floor time is considered to be time spent at the broker's premises or at real estate subject to a real estate transaction through the broker. (8) Open house or house tour. Any requirements either minimizing or limiting the time in which or during which an independent salesperson is expected to retain a house open for possible or probable sales, will be considered evidence of an employment relationship. The same is true of tours by salespersons or accompanying possible or probable purchasers to show real estate which is available for sale through the broker. (9) Sales meetings. The requirement that a salesperson attend sales meetings or any kind of regular or irregular meetings at any location, make communications to or for the broker, or make appearances at the broker's office or other facilities, will be considered evidence of an employment relationship.

Submission of documents attendant to a real estate transaction for review required by law or regulation is not considered an appearance or communication. (10)

Assigned territory (farm system). The assignment by a broker of a specific geographical territory in which an independent salesperson is expected to perform services will be considered evidence of control of the manner and means of performing services and of an employment relationship unless the agreement specifies that performance of services within a specific territory is consideration for entering into the agreement. (11) Working hours. Any requirement of a minimum or maximum time limitation upon the hours to be worked by an independent salesperson will be considered evidence of an employment relationship. In addition, while no inferences will be drawn from a part-time relationship, any requirement that an independent salesperson perform his or her services during any specified hours, whether normal business or overtime hours, will be considered evidence of employment. A broker, however, may properly expect an independent contractor to work diligently and to use his or her best efforts in performance of licensed activities. (12) Method of payment. While payment by commission only will not create an inference of either an employment or independent contractor relationship, payment by salary, guaranteed minimum commission, draws or advances against commissions, unless such advances are secured by promissory notes or other normally acceptable arrangement for repayment by the salesperson, will be considered evidence of an employment relationship. No inferences of employment relationship or independent contractor relationship will be drawn from bonuses which are paid as incentive for additional sales or comparable production, nor will increased commissions by amendment of the agreement with the broker, whether for a single transaction or not. However, overrides, drawing accounts, expense accounts, or other forms of consideration in addition to pre-determined commissions will be considered evidence of an employment relationship. (13) Benefit plans. The fact that a broker allows an

independent salesperson to participate in a health, medical, life insurance, or retirement insurance program will not be considered evidence of an employment relationship if the independent salesperson is required to, and in fact does, pay all premiums necessary for participation in such program. Any adjustments in commissions, or other remuneration to compensate the salesperson for payment for participation in such benefit plans will be evidence of employment. (14)

Workers' compensation insurance. The fact that a broker carries workers' compensation insurance on all salespersons, whether in an employment or independent contractor relationship, will not create an inference of employment, for the purposes of this section, with regard to independent salespersons if in an agreement between the broker and the independent salesperson it is clearly stated that workers' compensation insurance is being carried by the broker for his or her own benefit or for the mutual benefit of both parties. (15) Insurance and fidelity bonds. A contract requirement that an independent salesperson provide proof to the broker of public liability and property damage insurance, independently paid for by the independent salesperson, will be evidence of an independent relationship only if the amount of the required insurance can be shown to be greater than would be carried by the independent salesperson without such requirement. It will not be evidence of employment if a broker requires a salesperson to furnish a fidelity bond or malpractice insurance at the salesperson's expense. It is not evidence of employment if the broker carries blanket personal liability and property damage insurance, fidelity bond, or malpractice insurance on all salespersons regardless of whether they are employees or independent contractors. (16) Multiple listing service fees. If multiple listing boards list only brokers, membership of salespersons performing services for that broker are only incidental to membership by the broker. Therefore, the payment of multiple listing

service fees by the broker will not be considered evidence of an employment relationship between the broker and its independent salespersons. A contract requirement that the salesperson reimburse the broker in whole or in part for multiple listing service fees is evidence of an independent contractor relationship.

(17) Business licenses. While the requirements for business licenses vary from county to county and municipality, when a broker provides and pays for a business license to an independent salesperson, without a county or municipality requirement that he or she alone may do so, it will be evidence of an employment relationship.

(18) Combination operation (independent salesperson and employees). When a broker engages the services of salespersons, some of whom are considered employees and some of whom are considered independent salespersons, the lack of distinctly separate arrangements for the purposes of performing services between employees and independent salespersons will be considered evidence that all salespersons are employees.

(19) Termination. When, by terms of an agreement or by practice of the broker, the relationship between the broker and salesperson can be unilaterally terminated without 30 days' notice, it will be evidence of employment. Termination without such notice for breach of ethical standards, breach of statutory or regulatory requirements, or for the protection of the public, will not be considered evidence of employment.

(20) Agreement for specific or specialized purpose. It is recognized that a broker may enter into an agreement with a salesperson under which the salesperson will agree to perform services in connection with a single transaction, a single real estate development, or building tract, or other similar arrangement. In such cases, implications normally drawn, as described above, regarding specified territory, floor time, specified hours, open house arrangements, and assignments other than licensed activities shall not apply if the agreement specifies that such conditions

and services are part of the consideration for entering into the agreement. (21) Managers. Managers, including, but not limited to, sales managers, office managers, and general managers will be presumed to be employees of the broker. Whether remuneration for sales by the manager are wages in employment, depends on whether such sales are a part of the normal duties expected of this manager. (22) Form 1099 (Federal) and Form 599 (State). If a broker does not provide Internal Revenue Form 1099 and Franchise Tax Form 599 to salespersons considered by the broker to be independent salespersons, and submit copies of such forms to the Internal Revenue Service and Franchise Tax Board as required by law, such salespersons are considered employees and the broker is required to withhold personal income tax from any payments to such salespersons as required by the code.

(1)

Written contracts and agreements. Regulations of the Real Estate Commissioner provide that every broker will have a written agreement with each of its salespersons. Generally, when a broker and a salesperson agree to be employer and employee, an "employee contract" is signed, and when a broker and the salesperson agree to be independent contractors, an "independent contractor agreement" is signed. When an employment agreement is signed, it will be evidence of the intent of the parties. However, if the terms of the agreement are not complied with in practice, the agreement shall not determine the relationship of the parties to the agreement.

(2)

Broker's policies. Since the Business and Professions Code and regulations of the Real Estate Commissioner require the broker to insure that the rights of the parties to a real estate transaction are protected and that agreements affecting such rights be reviewed by the broker, it is expected that each broker will have certain policies which are

intended to protect the parties to a transaction and which must be binding upon all salespersons engaged by the broker. Such policies, including the selection of forms by the broker, shall be considered as would any other fact in determining if an employment relationship exists between the broker and salesperson. Such policies alone, however, will not establish the right to control the manner and means of performing services necessary for a determination that an employment relationship exists. However, brokers' policies relating to the manner and means of performing services that extend beyond those necessary to ensure satisfaction of statutory and regulatory requirements shall be evidence of the exercise of a right to control the manner and means by which a salesperson performs services. Contract provisions, or policies which lend themselves to the increase of business, profits, or sales activity will not be considered necessary to satisfy statutory or regulatory requirements. Such provisions would include, but not be limited to fees, time, solicitation, acquisition of listings, closures, floor time, termination, business licenses, fidelity bonds, automobile insurance, expenses, business cards, advertising, secretarial help, educational requirements, training, office and desk space. Such policies shall be construed as provided in this regulation. Policies relating to ethical standards required of persons in the real estate industry shall be considered as part of the statutory and regulatory requirements going to the end result of the services performed rather than the manner and means by which they will be performed.

(3)

Assignments other than licensed activities. If a salesperson is expected, by the broker, to fulfill assignments other than licensed activities or functions incidental thereto, it will be evidence of an employment relationship. Such assignments may involve public relations, tours, office duty, floor time, open house, phone solicitation, making deliveries, or making reports other than as required by law.

(4)

Educational requirements, training and skills. Since an independent contractor is supposed to be a person in business for himself or herself, it would not normally be necessary to train that person to perform the functions of that person's business, nor would it appear appropriate for a broker to require another independent businessman to seek any particular educational requirements. Therefore, any requirements in that regard will be looked on as evidence of employment. However, voluntary attendance at broker-provided training would not be evidence of employment.

(5)

Office and desk space. While a broker may allow an independent salesperson to use office facilities, other than incidental use of such facilities on a voluntary basis will be evidence of employment. Of particular significance, would be assigned desks or support personnel, such as secretarial and clerical help, continuing mail box or basket or other receptacle, continuing use of transcription or typewriting or duplicating facilities, or telephone facilities. Payment to the broker by the independent salesperson for the use of office facilities and desk space will only be considered evidence of an independent relationship if the charge by the broker bears a reasonable relationship to the actual value of the facilities used by the independent salesperson.

(6)

Business cards and advertising. Recognizing that statutes and regulations require that salespersons perform their services in the name of a broker, the fact that the broker's name appears on business cards used by a salesperson and advertising in the name of the broker will not be considered evidence of an employment relationship. However, if the salesperson's name does not appear on the business cards or the business cards are supplied to the salesperson by the broker without a reasonable charge to the salesperson, such cards will be considered evidence of an employment relationship. A salesperson may advertise for purposes of his or her licensed activity at his or her own

expense or by cost sharing with a broker without raising an inference of employment.

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Floor time. Assignment of floor time will be considered evidence of an employment relationship. Recognizing that it is to the economic advantage of a broker to allow independent salespersons to spend time on the facilities or premises of the broker, floor time will not be considered evidence of an employment relationship if it is allowed by the broker on a voluntary basis and allowed at the sole discretion of the independent salesperson. However, evidence that a salesperson is expected by the broker to perform floor time or that the relationship of the salesperson to the broker would be terminated for not performing some floor time will be evidence of employment. Floor time is considered to be time spent at the broker's premises or at real estate subject to a real estate transaction through the broker.

(8)

Open house or house tour. Any requirements either minimizing or limiting the time in which or during which an independent salesperson is expected to retain a house open for possible or probable sales, will be considered evidence of an employment relationship. The same is true of tours by salespersons or accompanying possible or probable purchasers to show real estate which is available for sale through the broker.

(9)

Sales meetings. The requirement that a salesperson attend sales meetings or any kind of regular or irregular meetings at any location, make communications to or for the broker, or make appearances at the broker's office or other facilities, will be considered evidence of an employment relationship. Submission of documents attendant to a real estate transaction for review required by law or regulation is not considered an appearance or communication.

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Assigned territory (farm system). The assignment by a broker of a specific geographical territory in which an independent salesperson is expected to perform services will be considered evidence of control of the manner and means of performing services and of an employment relationship unless the agreement specifies that performance of services within a specific territory is consideration for entering into the agreement.

(11)

Working hours. Any requirement of a minimum or maximum time limitation upon the hours to be worked by an independent salesperson will be considered evidence of an employment relationship. In addition, while no inferences will be drawn from a part-time relationship, any requirement that an independent salesperson perform his or her services during any specified hours, whether normal business or overtime hours, will be considered evidence of employment. A broker, however, may properly expect an independent contractor to work diligently and to use his or her best efforts in performance of licensed activities.

(12)

Method of payment. While payment by commission only will not create an inference of either an employment or independent contractor relationship, payment by salary, guaranteed minimum commission, draws or advances against commissions, unless such advances are secured by promissory notes or other normally acceptable arrangement for repayment by the salesperson, will be considered evidence of an employment relationship. No inferences of employment relationship or independent contractor relationship will be drawn from bonuses which are paid as incentive for additional sales or comparable production, nor will increased commissions by amendment of the agreement with the broker, whether for a single transaction or not. However, overrides, drawing accounts, expense accounts, or other forms of consideration in addition to pre-determined commissions will be considered evidence of an employment

relationship.

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Benefit plans. The fact that a broker allows an independent salesperson to participate in a health, medical, life insurance, or retirement insurance program will not be considered evidence of an employment relationship if the independent salesperson is required to, and in fact does, pay all premiums necessary for participation in such program. Any adjustments in commissions, or other remuneration to compensate the salesperson for payment for participation in such benefit plans will be evidence of employment.

(14)

Workers' compensation insurance. The fact that a broker carries workers' compensation insurance on all salespersons, whether in an employment or independent contractor relationship, will not create an inference of employment, for the purposes of this section, with regard to independent salespersons if in an agreement between the broker and the independent salesperson it is clearly stated that workers' compensation insurance is being carried by the broker for his or her own benefit or for the mutual benefit of both parties.

(15)

Insurance and fidelity bonds. A contract requirement that an independent salesperson provide proof to the broker of public liability and property damage insurance, independently paid for by the independent salesperson, will be evidence of an independent relationship only if the amount of the required insurance can be shown to be greater than would be carried by the independent salesperson without such requirement. It will not be evidence of employment if a broker requires a salesperson to furnish a fidelity bond or malpractice insurance at the salesperson's expense. It is not evidence of employment if the broker carries blanket personal liability and property damage insurance, fidelity bond, or malpractice insurance on all salespersons

regardless of whether they are employees or independent contractors.

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Multiple listing service fees. If multiple listing boards list only brokers, membership of salespersons performing services for that broker are only incidental to membership by the broker. Therefore, the payment of multiple listing service fees by the broker will not be considered evidence of an employment relationship between the broker and its independent salespersons. A contract requirement that the salesperson reimburse the broker in whole or in part for multiple listing service fees is evidence of an independent contractor relationship.

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Business licenses. While the requirements for business licenses vary from county to county and municipality, when a broker provides and pays for a business license to an independent salesperson, without a county or municipality requirement that he or she alone may do so, it will be evidence of an employment relationship.

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Combination operation (independent salesperson and employees). When a broker engages the services of salespersons, some of whom are considered employees and some of whom are considered independent salespersons, the lack of distinctly separate arrangements for the purposes of performing services between employees and independent salespersons will be considered evidence that all salespersons are employees.

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Termination. When, by terms of an agreement or by practice of the broker, the relationship between the broker and salesperson can be unilaterally terminated without 30 days' notice, it will be evidence of employment. Termination without such notice for breach of ethical standards, breach of statutory or regulatory requirements, or for the

protection of the public, will not be considered evidence of employment.

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Agreement for specific or specialized purpose. It is recognized that a broker may enter into an agreement with a salesperson under which the salesperson will agree to perform services in connection with a single transaction, a single real estate development, or building tract, or other similar arrangement. In such cases, implications normally drawn, as described above, regarding specified territory, floor time, specified hours, open house arrangements, and assignments other than licensed activities shall not apply if the agreement specifies that such conditions and services are part of the consideration for entering into the agreement.

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Managers. Managers, including, but not limited to, sales managers, office managers, and general managers will be presumed to be employees of the broker. Whether remuneration for sales by the manager are wages in employment, depends on whether such sales are a part of the normal duties expected of this manager.

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Form 1099 (Federal) and Form 599 (State). If a broker does not provide Internal Revenue Form 1099 and Franchise Tax Form 599 to salespersons considered by the broker to be independent salespersons, and submit copies of such forms to the Internal Revenue Service and Franchise Tax Board as required by law, such salespersons are considered employees and the broker is required to withhold personal income tax from any payments to such salespersons as required by the code.