



By Jerrold J. Stern

Are real estate professionals or their firms subject to payroll and unemployment taxes? For the typical real estate professional scenario, the answer has been “no” for many years. Nevertheless, it is worthwhile to be aware of the current rules.

First, some caveats. This article applies to *licensed* real estate professionals (brokers and salespersons). Unlicensed individuals may have tax issues that are beyond the scope of this article. Also, the term “employer” as used in this article means the owner(s) of the office with which the broker or salesperson is associated.

Real estate professionals are typically considered independent contractors by federal and Texas state law. As such, they are not employees. If they were employees, they and their employers would be subject to a 7.65 percent federal payroll tax on the first \$117,000 of compensation. Lower rates apply to higher compensation levels. In addition, employers (but not employees) would be subject to Texas unemployment taxes at rates as high as 7.41 percent on the first \$9,000 of compensation earned by employees. Employers may also be subject to federal unemployment taxes. Employees do not pay unemployment taxes under any conditions.

As independent contractors, real estate professionals are required to pay self-employment taxes directly to the IRS (that is, the U.S. Treasury Department). They do not pay payroll taxes, and their employers do not pay payroll or unemployment taxes.

The federal tax law provides numerous factors for determining employee status for federal (not state) tax purposes. No single factor is determinative. A major theme of the factors is “control.” The more control the employer has over the worker, the more likely the worker is an employee and not an independent contractor. For example, two factors potentially indicating employee status are:

- the worker’s work schedule is set by the employer, and
- the work is performed on the employer’s premises.

A full set of IRS criteria may be found at www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Independent-Contractor-Self-Employed-or-Employee.

The Texas Unemployment Compensation Act and the *Texas Law Manual* specifically state that real estate brokers and real estate salespersons are not employees and, therefore, their employers are not subject to Texas unemployment taxes.

Criteria for real estate professionals are provided in the act and the manual. A real estate professional is one who, for a fee or commission, performs one or more of the following activities:

- offers to, or actually negotiates, lists, sells, exchanges, purchases, rents or leases real estate;
- aids in locating real estate for the purpose of purchase, rental or lease;
- engages in the appraisal or auction of real estate;
- deals in options on real estate; or
- procures or assists to procure real estate transaction prospects.

However, there are pitfalls to avoid, highlighted by a 2013 Massachusetts Superior Court case now under consideration for review by the Massachusetts Supreme Judicial Court. The level of employer control over workers is the central issue. In this case, the employer made clear that all clients were the employer’s clients and not the clients of the broker-salespersons. The employer also required workers to perform duties that had nothing to do with real estate activities such as “front desk time” at prescribed hours, answering phone calls, taking out trash and cleaning bathrooms. There were also requirements about work attire and methods of client interaction. Disciplinary actions were taken if workers did not meet “productivity goals.” While the ultimate decision in Massachusetts only affects those working in Massachusetts, the case could conceivably influence future federal law and laws in other states.

In general, consultation with a tax accountant or tax attorney is recommended for all substantial employment tax issues. ♣

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THE TAKEAWAY

Are real estate professionals or their firms subject to payroll and unemployment taxes? Typically, the answer is “no,” but there are pitfalls to avoid and potential changes on the horizon.



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The Real Estate Center at Texas A&M University is the nation's largest publicly funded organization devoted to real estate research. The Center was created by the Texas Legislature in 1971 to conduct research on real estate topics to meet the needs of the real estate industry, instructors and the public.

Most of the Center's funding comes from real estate license fees paid by more than 135,000 professionals. A nine-member advisory committee appointed by the governor provides research guidance and approves the budget and plan of work.

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