

REAL ESTATE SALESPERSONS AND WORKER'S COMPENSATION IN WISCONSIN

Most Wisconsin employers are required to carry worker's compensation insurance under the Wisconsin Worker's Compensation Act. Wisconsin Statutes 102.28(2) requires **every employer**, as described in s. 102.04(1) of the Wisconsin Statutes, to insure payment of worker's compensation in an insurance company authorized to write worker's compensation insurance in Wisconsin.

An employer **becomes subject** to the Wisconsin Worker's Compensation Act under s. 102.04(1) and must carry a worker's compensation insurance policy when:

- 1) The employer usually employs three or more persons full or part-time for services performed in Wisconsin. (This employer needs insurance immediately); or
- 2) The employer has one or more full-time or part-time employees and has paid gross combined wages of \$500 or more in any calendar quarter for work done in Wisconsin. This employer must have insurance by the tenth day of the first month of the next calendar quarter.

We frequently receive inquiries regarding the worker's compensation status of real estate salespersons who are licensed to work for a broker, and who are operating as so-called independent contractors, or as so-called self-employed commissioned salespersons.

A person may be an independent contractor for most or for all other purposes and still be an employee under the Wisconsin Worker's Compensation Act. Wisconsin Statute 102.07(8) states, "every independent contractor is, for the purpose of this chapter, an employee of any employer under this chapter for whom he or she is performing service in the course of the trade, business, profession or occupation of such employer at the time of the injury" unless the independent contractor meets **all nine conditions** of the Independent Contractor Definition under s. 102.07(8)(b). To qualify as an independent contractor and not as an employee a person must meet **all** of the following conditions:

1. Maintains a separate business with his or her own office, equipment, materials and other facilities.
2. Holds or has applied for a federal employer identification number from the Federal Internal Revenue Service (IRS) **or** have filed business or self-employment income tax returns with the IRS based on the work or service in the previous year. (*A social security number cannot be substituted for a FEIN and does not meet the legal burden of s. 102.07(8), Wis. Stats.*)
3. Operates under contracts to perform specific services or work for specific amounts of money and under which the independent contractor controls the means of performing the services or work.
4. Incurs the main expense related to the service or work that he or she performs under the contract.
5. Is responsible for the satisfactory completion of work or services that he or she contracts to perform and is liable for a failure to complete the work or service.
6. Receives compensation for work or service performed under a contract on a commission or per job or competitive bid basis and not on any other basis.

7. May realize a profit or suffer a loss under contracts to perform work or service.
8. Has continuing or recurring business liabilities or obligations.
9. The success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures.

Unless the independent contractor meets **all nine points** of the test, he or she would be an employee of the broker/employer.

Chapter 452.01(7) of the Wisconsin Statutes relating to the practice of real estate, defines a real estate salesperson as "any person other than a broker who is employed by a broker to perform any act authorized by Chapter 452 to be performed by a broker."

Chapter 452.12(3) provides that "each broker is responsible for the acts of any brokers, **salesperson** or time-share salesperson employed by the broker."

All licensed real estate salespersons are required to work for a licensed broker. The broker/employer is required to: 1) supervise its salespersons and brokers; 2) provide operating procedures for all documents relating to transactions; and 3) be responsible for the preparation, custody, safety and corrections of entries to control the documents. These requirements demonstrate the right to control the details of the work, the key test of an employment relationship.

Since a salesperson who is not licensed as a broker must be licensed to a broker and that broker is responsible for the acts of the salesperson, the employer/employee relationship is clearly established, as is the element of direction and control over the salesperson by the broker.

Direction and control of the salesperson by the broker is further demonstrated by the fact brokers can terminate the relationship between themselves and any of their salespersons at their discretion, and the salesperson must suspend selling of real estate until licensed to another broker.

The "salesperson" could not legally maintain a separate real estate business and hold himself or herself out to render service to the public.

In view of the statutory provisions cited, it has consistently been determined in cases before this department that real estate salespersons licensed to work for licensed brokers are employees of the broker under the Wisconsin Worker's Compensation Act.

If you have questions regarding the Wisconsin Worker's Compensation Act and the requirements to carry worker's compensation insurance in Wisconsin, please call the Wisconsin Worker's Compensation Division, Bureau of Insurance Programs at (608) 266-3046 or you can reach us by fax at (608) 266-6827.

DWD is an equal opportunity employer and service provider. If you have a disability and need information in an alternate format, or need it translated to another language, please contact (608) 266-1340 voice or (608) 266-0477 TTY.