



# SEEKING A HELPING HAND?

## WHAT TO CONSIDER **BEFORE HIRING** A PERSONAL ASSISTANT

Hiring a personal assistant is a bigger decision than many real estate salespersons realize. The Georgia Real Estate Commission has rules on the type of work licensed and unlicensed assistants can do and the documentation that must exist between the salesperson and the broker, the salesperson and the assistant, and the assistant and the broker. The real estate salesperson must also evaluate whether the assistant, based on the type and manner of the work he or she performs, should be an employee or an independent contractor of the salesperson. Making a mistake in this area can expose the real estate salesperson to potential tax liability and liability for the negligent acts of the assistant performed at work.

In conducting an informal poll of real estate salespersons, some are treating their assistants as independent contractors when, in fact, the true legal nature of the relationship is likely one of employer-employee. This article will help salespersons better understand when an assistant should be an employee versus an independent contractor. It will also discuss the license law requirements involved with having an assistant.

### **LICENSED OR UNLICENSED PERSONAL ASSISTANTS?**

A licensed assistant can do all of the things that a real estate salesperson can do. An unlicensed assistant can do none of the things that can only be done by a real estate licensee under Georgia license law. This means that an unlicensed assistant cannot do the following:

- 1.** Make cold calls to secure new business prospects;
- 2.** Host open houses, kiosks, home show booths, or fairs;
- 3.** Prepare promotional materials and advertisements without the review and approval of the salesperson for whom the assistant is working and the supervising broker;
- 4.** Show property;
- 5.** Answer questions on title, financing, or closings (other than the time and place);
- 6.** Answer questions regarding a listing except for information on price and amenities authorized in writing by the salesperson for whom the assistant is working;
- 7.** Discuss or explain a contract, listing, lease, agreement, or other real estate document with anyone outside the firm;
- 8.** Negotiate or agree to any commission, commission split, management fee, or referral fee on behalf of a salesperson for whom the assistant works;
- 9.** Discuss the attributes or amenities of a property, under any circumstances, with a prospective purchaser or lessee;
- 10.** Discuss with the owner of real property, the terms/conditions of the real property offered for sale or lease;
- 11.** Collect or hold deposit monies, rent, other monies or anything of value received from the owner of real property or from a prospective purchaser or lessee;
- 12.** Provide owners of real property or prospective purchasers or lessees with any advice, recommendations or suggestions as to the sale, purchase, exchange, or leasing of real property that is listed, to be listed, or currently available for sale or lease; or



## Characteristics of PERSONAL ASSISTANTS

- 14 percent of REALTORS® use at least one personal assistant
- 2 percent of REALTORS® use two or more assistants
- 49 percent of personal assistants are licensed
- 58 percent of personal assistants are employed part-time
- 63 percent of personal assistants work exclusively for one REALTORS®

SOURCE: 2013 National Association of REALTORS® Member Profile, (National Association of REALTORS®, 2013). For more information on personal assistants, visit NAR's Field Guide to Personal Assistants.

**13.** Hold himself or herself out in any manner, orally or in writing, as being licensed or affiliated with a particular firm or real estate broker as a licensee.

An unlicensed real estate licensee can do all of the following:

- 1.** Answer the phone and forward calls to a licensee;
- 2.** Submit data on listings to a multiple listing service;
- 3.** Check on the status of loan commitments after a contract has been negotiated;
- 4.** Assemble documents for closings;
- 5.** Secure documents that are public information from the courthouse and other sources available to the public;
- 6.** Have keys made for company listings and install or remove lock boxes from company listings;
- 7.** Write advertisements and promotional materials for the approval of the licensee and supervising broker;
- 8.** Place advertisements in magazines, newspapers, and other media as directed by the supervising broker;
- 9.** Receive, record, and deposit earnest money, security deposits, and advance rents;
- 10.** Type contract forms as directed by the salesperson and the supervising broker;
- 11.** Monitor personnel files and license reports from the real estate commission;
- 12.** Compute commission checks;
- 13.** Place signs on property and removing such signs;
- 14.** Order items of routine repair as directed by a salesperson;
- 15.** Act as courier for such purposes as delivering documents or picking up keys;
- 16.** Schedule appointments with the owner or the owner's agent in order for a licensee to show listed property;
- 17.** Arrange dates and times for inspections;
- 18.** Arrange dates and times for the mortgage application, the pre-closing walk through, and the closing;
- 19.** Schedule an open house;
- 20.** Accompany a licensee to an open house or a showing only for security purposes; or
- 21.** Perform physical maintenance on a property.

A licensed assistant can obviously do much more than an unlicensed assistant. When you boil it all down, an unlicensed assistant is largely limited to performing administrative functions, while a licensed assistant can perform administrative and brokerage functions. Therefore, the business questions for real estate salespersons to ask are (1) what kind of help does the salesperson need, administrative or brokerage; and (2) is the generally higher cost of a licensed assistant justified in light of the type of help needed by the salesperson?

## COMPLIANCE ISSUES

There are several requirements a real estate licensee must comply with when hiring or deciding to become an assistant. First, a real estate licensee cannot be an assistant for a second licensee who is not affiliated with the same broker. In other words, if licensed real estate assistant A has her license with Broker A, he or she can only be an assistant for a licensee who is also affiliated with Broker A.

Second, any real estate brokerage firm that allows a licensee to hire an assistant must: (1) enter into a written agreement with the licensee authorizing the use of the assistant setting forth the duties the support personnel may perform, and approving any compensation arrangement between licensee and the assistant; (2) enter into a written agreement with the assistant specifying the duties the assistant may perform on behalf of the licensee; and (3) confirm that the licensee and the assistant have entered into a written agreement specifying all duties that the assistant may perform on behalf of the assistant and the manner in which the assistant will be compensated.

While this may sound cumbersome, it is designed to avoid disputes over compensation between a salesperson and the salesperson's assistant and ensure that there are clear lines of authority between the broker, the salesperson and the salesperson's assistant.

## EMPLOYEE OR INDEPENDENT CONTRACTOR?

Some real estate salespersons mistakenly think that how they refer to the assistant in a written contract with him or her establishes the legal relationship between the parties. Under this misapprehension, if a salesperson identifies an assistant as an independent contractor it somehow makes it so. Nothing could be further from the truth.

If a court or the IRS looks at whether an assistant is an independent contractor or an employee, they normally review a variety of factors relating to how, when and under what circumstances the assistant does his or her job. In other words, they look at the substance of the business relationship between the parties and not just what it is called.

The IRS uses a 20 factor analysis of whether a worker is an employee or an independent contractor. These factors, in the context of being an assistant to a real estate salesperson, include the following:

**1. Instructions.** Assistants who comply with the salesperson's instructions as to when, where, and how they work are more likely to be employees than independent contractors.

**2. Training.** The more training the assistant receives from the salesperson, the more likely it is that he or she will be an employee. The underlying concept here is that independent contractors are

supposed to know how to do their work and, thus, should not require training from the people using their services like real estate salespersons.

**3. Integration.** The more important that the assistant is to the success or continuation of the salesperson's business, the more likely it is that he or she is an employee.

**4. Services rendering personally.** Assistants who personally perform the services for which the salesperson is paying are more likely employees. In contrast, independent contractors usually have the right to substitute other people's services for their own in fulfilling their contracts.

**5. Hiring assistants.** Assistants who are not in charge of hiring, supervising, and paying personnel to support the assistant are more likely employees.

**6. Continuing relationship.** Assistants who perform work for the salesperson for significant periods of time or at recurring intervals are more likely employees.

**7. Set hours of work.** Assistants for whom the salesperson establishes set hours of work are more likely employees. In contrast, independent contractors generally can set their own work hours.

**8. Full time required.** Assistants who are required to work or be available full time are likely to be employees. In contrast, independent contractors generally can work whenever and for whomever they choose.

**9. Work done on premises.** Assistants who work at the salesperson's place of business or other place designated by the salesperson are more likely employees. In contrast, independent contractors usually have their own place of business where they do their work for the salesperson.

**10. Order or sequence set.** Assistants for whom the salesperson sets the order or sequence in which they perform their services are more likely employees.

**11. Reports.** Assistants who are required by the salesperson to submit regular reports are more likely employees.

**12. Payment method.** Assistants who are paid by the hour, week, or month are more likely employees. In contrast, independent contractors are usually paid by the job.

**13. Expenses.** Assistants whose business and travel expenses are usually paid by the salesperson are more likely employees. In contrast, independent contractors are usually expected to cover their own overhead expenses.

**14. Tools and materials.** Assistants who use tools, materials, and other equipment furnished by the salesperson are more likely employees.

**15. Investment.** The greater the assistant's investment in the facilities and equipment in

performing their services, the more likely it is that they are independent contractors.

**16. Profit or loss.** The greater the likelihood that the assistant can either make a profit or suffer a loss in rendering his or her services, the more likely it is that the assistant is an independent contractor.

**17. Works for more than one person at a time.** The more businesses for whom the assistant works, the more likely the assistant is an independent contractor.

**18. Services available to general public.** Assistants who hold their services out to other real estate salespersons in the same company (for example, through business cards, advertisements, and other promotional items) are more likely independent contractors.

**19. Right to fire.** Assistants who can be fired at any time by the salespersons for whom they work are more likely employees. In contrast, the right to terminate an independent contractor is generally limited by specific contractual terms.

**20. Right to quit.** Assistants who can quit at any time without incurring any liability to the salesperson are more likely employees. In contrast, independent contractors generally cannot normally walk away in the middle of a project without running the risk of being held financially accountable for their failure to complete the project.

Let's look at the following two examples to better understand when an assistant is an employee or an independent contractor.

**EXAMPLE #1:** Real Estate Salesperson A regularly engages Salesperson B to help with overflow work. Salesperson A has Salesperson B sit at open houses but, on occasion, she will have her show properties to out of town buyers. Salesperson B also has her own independent business and also sits at open houses for other salespersons in the company. Salesperson A does not direct Salesperson B on how to conduct the open house or work with out of town buyers. Salesperson B uses her own car and does not charge Salesperson A for mileage or expenses. In performing her work, Salesperson B makes her own decisions as to how best to perform her job and generally does exactly what she would do if she were working on her own. Salesperson B gets paid a flat amount for handling open houses. She gets paid a referral fee if a buyer referred to her by Salesperson A buys a house. Is this relationship an employer-employee relationship or an independent contractor relationship?

**ANSWER:** Considering all of the above-referenced factors, this certainly looks like an independent contractor relationship. This is because Salesperson B controls the manner in which the work is performed, does not use any equipment or other supplies provided by Salesperson A, does not charge for expenses, works only on

a limited basis for Salesperson A (since she also has her own work), the payment for handling the open house is a flat fee and in finding the buyer a house is contingent upon the success of Salesperson B's efforts.

**EXAMPLE #2:** Salesperson B works three days a week as the assistant to Salesperson A. Salesperson B has no other job. She works based on a schedule given to her by Salesperson A basically handles assignments given to her daily and is often told by Salesperson A how to do her work. Salesperson B uses a telephone provided to her by Salesperson A. She works either out of her own home or at the home office of Salesperson A. She receives no benefits but receives two weeks paid vacation each year. Is this relationship an employer-employee relationship or an independent contractor relationship?

**ANSWER:** Based on the above factors, this appears to be a more traditional employer-employee relationship. The time, manner and method of work all appear to be controlled by Salesperson A. The fact that Salesperson B only works for Salesperson A, is directed on how to do the work by Salesperson A, uses equipment provided by Salesperson A and receives vacation benefits are all indicative of an employer-employee relationship.

Whether a business relationship is that of an employer-employee or is an independent contractor relationship has significant legal consequences. An employer is generally responsible for the torts committed by an employee within the scope of his or her employment. This is not the case if the worker is an independent contractor. If the salesperson calls the relationship with an assistant an independent contractor relationship, but the true nature of the relationship is one of employer-employee, the salesperson can still be legally liable for the torts of the work. While the courts in reviewing these types of cases use a slightly different test than that used by the IRS, the key principles are largely the same. Let's look at the example below to better understand the liabilities in this area.

**EXAMPLE #3:** A real estate salesperson has a written agreement with her assistant in which the assistant is characterized as an independent contractor. However, the true legal nature of the relationship is really one of an employer-employee. The salesperson tells her assistant to drive as fast as she can over to a copy center to pick up some marketing brochures. The assistant takes her literally and speeds to the copy center. Along the way, she gets into a car accident in which the other driver and his family are seriously injured. Can the salesperson be liable for the injuries?

**ANSWER:** The answer to this question is yes. As a general rule, an employer is responsible for the torts committed by an employee within the scope of the employment under a legal doctrine known as respondeat

superior. This would not generally have been the case, however, if the assistant had been an independent contractor. Plaintiffs lawyers representing the injured family are not at all deterred by the fact that the salesperson has entered into an independent contractor agreement with an assistant. Instead, in deciding who to sue the lawyer will likely investigate the true nature of the relationship and, if appropriate, sue the real estate salesperson and try to impose liability by arguing that the true nature of the relationship is one of employer-employee.

**EXAMPLE #4:** A real estate salesperson enters into an independent contractor agreement with her assistant even though the true nature of the relationship is one of employer-employee. The assistant works for her for five years and during that entire time the assistant never pays income tax on the salary received by the assistant. One day she makes a tearful confession of her misdeeds to the real estate salesperson. Does the real estate salesperson have potential liability for the unpaid taxes?

**ANSWER:** The answer to this question is yes. If the true nature of the business relationship is one of employer-employee, the real estate salesperson could be liable for the taxes that should have been withheld by the employer. If the independent contractor relationship is a sham, the IRS can go beyond what the relationship is called and treat it as the employer-employee relationship it actually is. The IRS can look back seven tax years in trying to collect unpaid taxes that should have been collected by the salesperson or the broker.

### MITIGATING RISK

So what is the best way for a real estate salesperson to deal with these risks? My recommendation is to honestly evaluate the nature of the business relationship with an assistant and correctly characterize the relationship in writing and practice. If it is an employer-employee relationship, contact a payroll service and start to withhold taxes. If it is an independent contractor relationship, make sure that the assistant receives a 1099 for compensation they received during the year.

The most important call that a salesperson with an assistant can make is to an insurance professional who can advise the salesperson on the type of liability insurance the salesperson should have to protect against claims involving the assistant. This should be done in conjunction with a review of the insurance the salesperson's broker may already provide since the assistant may also be covered for certain types of claims under the broker's policy. In business, risk can rarely be eliminated but can usually be insured against.

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