2012-2013 BROKER-IN-CHARGE ANNUAL REVIEW

EMPLOYMENT ISSUES

Outline:
Introduction
Business Entity Forms
Employee versus Independent Contractor?
Internal Revenue Service Criteria
Unemployment Tax Purposes
Workers' Compensation Purposes

Learning Objective: Upon completing this Section, licensees should have a better understanding of the various issues they should consider when deciding how to engage in business and whether to hire or associate others with their real estate company.

INTRODUCTION

So long as a broker chooses to engage in real estate brokerage independently, whether as a sole proprietorship or as a one person entity, then s/he avoids the issue of employees or associates and merely needs to understand his/her individual obligations vis-a-vis the Internal Revenue Service, the Department of Labor, the NC Department of Revenue, the NC Industrial Commission and the NC Department of Employment Security. However, the moment the broker-owner of the real estate company decides to hire or associate others, whether an assistant, a receptionist, a bookkeeper, an office manager or other licensed real estate agents, to work for the broker's real estate company, that broker should be aware of the scope of his/her liability for those others and their actions, which liability may not be limited merely to tax withholding considerations.

This Section will first briefly discuss various business forms under which one may conduct brokerage activities, and then will expand into a discussion of worker classification as employee or

independent contractor and the differing standards that may apply in making that determination. As licensees will learn, the mere fact that an associate may be paid as an independent contractor for State and Federal tax purposes does *not* necessarily absolve the company from all responsibility or liability for that individual.

BUSINESS ENTITY FORMS

The Real Estate Commission neither dictates nor advocates any particular form of business over another; that decision rests with each owner. The initial decision confronting any entrepreneur is whether to do business as a sole proprietor or as some form of business entity, whether a corporation, a limited liability company, a partnership, a limited partnership, a limited liability limited partnership, a joint venture, or sundry other options. Each option has its own consequences. This subsection will briefly discuss sole proprietorships, how to create an entity, and what needs to be licensed. It will not address tax considerations or other consequences resulting from creating an entity.

Sole Proprietorship

A sole proprietorship is a company that is owned by only *one person* who is ***personally liable for all the debts and obligations of the company***. A sole proprietorship may have only one employee, namely, the owner, or may have multiple affiliated brokers and/or unlicensed employees working for his/her company. The owner is viewed by the IRS as self-employed and reports any and all income received by the company on Schedule C of his/her individual income tax return each year, and deducts from gross receipts his/her costs of doing business, e.g., overhead expenses, advertising, compensation paid to unlicensed and licensed associates, any FICA or tax withholdings due for compensation paid to individuals working for the company, etc. The owner then pays a self-employment tax on the entire net business income remaining, in addition to whatever state and federal income taxes may be due on his/her personal income tax return.

So long as a broker chooses to be a one-person company, the broker may decide to remain a sole proprietor, in which case only the individual broker must be licensed as the broker and the entity are one and the same. The only license that must be renewed each year is the individual broker's license and the broker must pay the privilege tax each year to the NC Department of Revenue. However, the moment an owner considers hiring other individuals to work for his/her company, s/he may want to create an entity, not only for tax reasons, but to attempt to shield the owner's *personal assets* from claims against the company arising from its associated agents' or employees' conduct.

Business Entities

An owner may decide to create an entity under which to conduct brokerage activity, rather than remain a sole proprietorship. The owner creates the entity by (preferably) written agreement with any other owners, and then registers the entity with the NC Secretary of State Corporations Division for permission to do business in North Carolina if the entity is a corporation, limited liability company, limited partnership, or limited liability limited partnership. Other entity forms such as general partnerships, joint ventures, or business trusts are not required to register with the NC Secretary of State. Entities created in North Carolina typically file either articles or certificates

of registration whereas foreign entities (those created in other states) wishing to do business in North Carolina file certificates of authority or registration. For more information on the various forms, filing requirements, fees and frequently asked questions, licensees are referred to the Secretary of State's website at www.secretary.state.nc.us/corporations. Business Link North Carolina, sponsored by the NC Department of Commerce, at www.blnc.gov also has a wealth of information.

Once the owners have created the entity and registered it with the Secretary of State, if applicable, they must then apply to the Real Estate Commission for and obtain a *real estate firm license* **before** the entity begins engaging in brokerage or receives any income from brokerage activity. The firm real estate license application may be found on the Commission's website (www.ncrec.gov) under "Forms." [REC 1.72.]

Qualifying Broker

Licensees are reminded that in order to obtain a firm license, the company must have a "*qualifying broker."* The qualifying broker is an individual who has a particular position within the entity and who possesses an active NC broker license not on provisional status. The qualifying broker must be an ***officer*** *of a corporation*, or a ***manager*** *of a limited liability company*, or a ***general partner*** *of any type of partnership*. [Rule 58A.0502(b).] If the entity is something other than a corporation, limited liability company or some form of partnership, then the qualifying broker must be a "principal," defined as a person or entity owning ten percent or more of the company who possesses an active NC broker license and who is "... an officer, director, manager, member, partner or who holds any other comparable position." [Rule 58A.0502(a).] *Whenever the company lacks a qualifying broker,* ***the company's license will be on inactive status***. Because the company has a license it cannot use, it will no longer have any offices or associated brokers, because it shouldn't be engaging in brokerage.

Once the entity is created and appropriately licensed, it may then engage in brokerage through its affiliated individual brokers. In addition to renewing the firm's license every year, the entity, if registered with the Secretary of State, must also file an annual report, usually with the Secretary of State, although corporations may include the annual report with the income tax return filed with the NC Department of Revenue. Annual reports are generally due April 15 of each year and present fees are: corporations = $18 if filed electronically with SOS and $25 if filed as hard copy with Dept of Revenue, and $200 for limited liability companies, limited partnerships, or limited liability partnerships.

Liability Protection

The extent to which an entity protects the owners from personal liability depends on the type of entity created. *Licensees should seek legal counsel concerning the varying degrees of liability protection offered by different entity forms, and confer with a tax attorney or consultant regarding the tax benefits afforded by each form of entity*.

In brief, *corporations* are the only entities at present that are considered "persons" under the law and are legally separate from the owners, who generally are protected from any personal liability for debts and obligations of the corporation or judgments resulting from wrongful acts of its employees or officers. *Limited liability companies* were created by statute and blend some corporate

features with partnership features. They too provide owners with limited personal liability for actions of the business and may offer special tax treatment. Similarly, a *limited liability partnership* has only general partners, but affords the general partners/owners some limited protection from liability for actions and obligations of the business. Normally, however, the general partners of a *partnership* or *limited partnership* remain liable for the debts and acts of the partnership.

EMPLOYEES VERSUS INDEPENDENT CONTRACTORS

Internal Revenue Service Criteria

Basic Classification Test

The Internal Revenue Service recognizes four categories of workers, namely: employees, independent contractors, statutory employees and statutory non-employees. The IRS applies a ***common law standard*** to determine whether an individual working for an owner or company is an employee or independent contractor. It looks at the *substance of the relationship between the worker and the business and the degree of control the business exercises over the worker*, rather than what the parties may label their relationship. If the worker is an "employee," then the employer must withhold and quarterly remit to the appropriate authorities social security, Medicare and unemployment taxes, as well as state and federal income tax due on the compensation. An employer who fails to properly withhold and remit these taxes may be liable for the amount of income tax that should have been withheld, as well as the employer's share of the social security and Medicare taxes, in addition to penalties and interest.

The IRS considers three aspects in assessing the degree of control or independence that exists between the worker and the business; these are:

Behavioral control: to what extent does the business have a right to control or dictate not only the result or outcome of a project, but *how* the work is done, where and when it is done, in what sequence, using what supplies or tools, etc.

Financial control: to what extent does the business have a right to control or direct the financial and business aspects of the worker's job. Considerations include how the worker is paid, whether business expenses are reimbursed, the extent of the worker's investment and whether the worker can realize a profit or loss from his/her efforts.

Type of relationship: this category considers facts such as whether a written contract exists, whether the business provides benefits such as insurance or vacation or sick pay or a pension plan, and the permanency of the relationship.

The **general rule** is that *if the business has the right to control or direct not only the result of the work, but also the means and methods of accomplishing the result, the worker is an employee even if allowed some freedom of action*. According to the IRS, the key is having the *right* to control or direct the details as to how the service is performed, even if some latitude is allowed the worker.

Obviously, the IRS prefers workers to be classified as "employees" so the employer is required to withhold the taxes previously mentioned, whereas businesses may prefer to view their workers as independent contractors and thereby escape any liability for withholding any taxes. After years of wrangling between the IRS and various companies, Congress intervened and in 1982 enacted Section 3508 of the Internal Revenue Code creating a new class of "***statutory nonemployees***" that included direct sellers and *qualified real estate agents*.

Qualified Real Estate Agent

In IRS parlance, the "service-recipient" is the company that employs the individual broker-agent. The relevant portion of the 1982 statute creating this exemption is reprinted below:

> **26 United States Code §3508: Treatment of real estate agents and direct sellers.**
> **(a)** General rule. For purposes of this title, in the case of services performed as a qualified real estate agent or as a direct seller
> **(1)** the individual performing such services shall not be treated as an employee, and
> **(2)** the person for whom such services are performed shall not be treated as an employer.
>
> **(b)** Definitions. For purposes of this section
> **(1)** Qualified real estate agent. The term 'qualified real estate agent' means any individual who is a sales person if—
> **(A)** such individual is a licensed real estate agent,
> **(B)** substantially all of the remuneration (whether or not paid in cash) for the services performed by such individual as a real estate agent is directly related to sales or other output (including the performance of services) rather than to the number of hours worked, and
> **(C)** the services performed by the individual are performed pursuant to a written contract between such individual and the person for whom the services are performed *and such contract provides that the individual* ***will not be treated as an employee with respect to such services for Federal tax purposes***.

Thus, so long as the individual:

- is a licensed real estate broker
- receives compensation directly related to his/her sales or output, regardless of time spent, and
- has a *written contract* with the company stating that the worker will not be treated as an employee for federal tax purposes

then the individual will be viewed as an independent contractor for IRS purposes and will be individually responsible for paying any income taxes and self employment taxes for social security and Medicare. The business remains responsible for documenting all compensation paid to the broker and for timely providing both the broker and the IRS and NC Department of Revenue with a Form 1099-MISC each year and retaining those records as discussed in Section 1 of these materials.

In 1986, the Internal Revenue Service issued rules further interpreting the foregoing statute. The rule clarifies that qualified real estate brokers will not be treated as employees for brokerage services after December 31, 1982 and the service-recipient (the real estate company) will not be treated as an employer. This applies to actively licensed brokers who engage in sales or leasing for others, as well as to brokers who don't personally sell, but who recruit, train or supervise other brokers who make sales *so long as* the compensation is directly related to the performance of the services and not to the number of hours involved. The comments to the rule emphasize the importance of having a ***written contract that explicitly states that the individual will not be treated as an employee for Federal tax purposes*** and further state: "For this purpose, it is not sufficient that the contract merely states that the individual will not be treated as an employee."

The "substantially all remuneration" standard is satisfied if at least 90% of the total compensation received in any year is directly related to sales or other output, rather than number of hours worked. The rule also provides guidelines for applying the "directly related" requirement to pooled remuneration arrangements and remuneration received in advance of performance or dependent on the productivity of others. The rule states that services performed as a real estate agent include advertising and showing property, performing market analyses, closing sales, acquiring a lease to property, and recruiting, training and supervising other sales agents. The rule expressly acknowledges that this exemption only applies to services provided as a "qualified real estate agent." There is no presumption that an individual will also be classified as an independent contractor if the broker provides other services for the company; rather, the common law test as to control or direction will be applied to determine whether the individual is an employee or independent contractor as to compensation received for non-brokerage services. The rule provides the following examples:

> **Example 1.** A is a licensed real estate agent who performs services as a real estate agent pursuant to a written contract that states A will not be an employee for Federal tax purposes. In addition to performing services as a real estate agent, A performs general bookkeeping duties for the same service-recipient. All of the remuneration for the services performed as a real estate agent is directly related to sales. A will be treated as a nonemployee under section 3508 only with respect to A's services as a real estate agent. Whether A is treated as an employee or as a self-employed individual with respect to the bookkeeping duties will be determined under common-law principles.
>
> **Example 4.** Assume all the requirements of section 3508(b)(1) and paragraph (b) of this section are satisfied with respect to A, a real estate agent, *except* that A did not obtain a real estate license until March 29. The license was valid for the remainder of the year. A is treated as self-employed under section 3508 for that portion of the year beginning on March 29. Whether for Federal tax purposes A is to be treated as self-employed for the other portion of the year shall be determined under common law.

In 1996 the IRS created training materials for its agents to assist them in determining whether an individual should be classified as an independent contractor or an employee. The following Case Study is drawn almost verbatim from those training materials (Course 3320-102).

Training Case Study

Below is information regarding a contract agreement required to be signed by sales agents for a real estate business. The written contract contains the following provisions.

Sales Agents agree to:

1. Work diligently and conduct their business in a manner to increase the goodwill and reputation of the business.
2. Provide their own license, which is required by state law, pay their own dues for membership in the local real estate exchange and provide their own transportation.
3. Report to the office daily and attend weekly sales meetings . These, however, are not mandatory.
4. Take turns keeping the office open on Saturday afternoon and Sunday.
5. Refrain from selling real estate for other brokers and from making sales in their own name and on their own behalf.
6. Solicit new listings and customers.
7. Pay all of their own expenses.

The business agrees to:

1. Make available to sales agents all current listings and facilities of the business's office which include office help and office expenses.
2. Assist the sales agents in their work by providing advice, instructions, and cooperation.
3. Furnish necessary business cards, forms and stationery.

Additional information provided includes:

1. Each sales agent receives a manual that explains the business's operating policies in detail.
2. All sales are closed in the name of business/real estate company.
3. Commissions are paid to the business and are divided monthly between the sales agent and the business according to a fixed schedule.
4. The contract states that the sales agent will not be treated as an employee for federal tax purposes.

Answer to Case Study:

If it is the intent of the business that an employer-employee relationship is not to exist, then the business must not retain the right to control the manner and means whereby the sales agents perform their work. The business may set the tasks, define the objectives, and specify the results to be achieved. The mode and manner of accomplishment must, however, be left to the sales agent.

Analysis: The sales agents in this case are determined to be independent contractors (self-employed persons). Some of the factors present in the relationship would tend to lead you to the conclusion that the relationship is that of employer-employee.

1. The sales agents are to work diligently for the business.

2. They have agreed to report to the office daily and attend weekly sales meetings.
3. They take their turns in keeping the office open.
4. They may not sell in their own name nor for other brokers.

On the other hand, they:
1. Pay their own expenses;
2. Provide their own licenses;
3. Furnish their own transportation;
4. Are not required to report to the office or attend sales meetings;
5. Are compensated only by commissions they earn.

Conclusion: The sales agents would not be employees *even if the business exercised greater control* because they meet the qualifications of IRC section 3508(b)(1). [Italics added. Concludes IRS training exercise.]

Unlicensed Workers

From an IRS perspective then, a company's affiliated brokers will be classified as independent contractors and the company will have no withholding responsibilities *so long as* the broker has an active license and a written contract with the company stating that the broker will not be treated as an employee for Federal tax purposes and virtually all of the broker's compensation is directly related to the broker's sales, productivity or related brokerage services provided without regard to time invested in the task. However, what about any *unlicensed staff* a company may hire, such as a receptionist or clerical support or bookkeeper or unlicensed assistants for some of the company's affiliated brokers? How are such workers classified?

Because there is no statute automatically classifying non-brokers, the IRS will return to its basic common law standard and review the degree of control the employer exercises over the unlicensed staff person for any services they provide, whether on a part-time or full-time basis. It is suspected that in the vast majority of cases, unlicensed staff will be viewed by the IRS as *employees* of the real estate company because usually their tasks, duties or assignments are dictated by others. If such unlicensed assistants/workers are employees, then the company must withhold social security, Medicare, and state and federal tax from the employee's wages and remit it with the employer's share of social security and Medicare tax to the appropriate authorities quarterly. As noted earlier, misclassifying a worker and failing to properly withhold when required can result in substantial penalties. When in doubt, a company should consult a knowledgeable tax advisor or may actually apply to the IRS for a determination of the worker's status by filing IRS Form SS-8.

Staffing Agencies

About the only way to transfer this responsibility for employees is if the company decides to *lease workers from a staffing agency*. In this arrangement, the real estate company contracts with a staffing or personnel agency to supply whatever workers the company may need for an agreed period of time. The staffing agency bills the real estate company monthly or semi-monthly for the workers it provides, and then pays its workers who are viewed as employees of the staffing agency which is responsible for making and remitting all required withholdings.

For further information on these classification issues, licensees are referred to IRS Publication 15 (Circular E), *Employer's Tax Guide*, and Publication 15-A, *Employer's Supplemental Tax Guide*.

NOTE: The G.S. 93A-2(c)(6) exception that allows a **broker** who manages properties belonging to others to hire unlicensed salaried employees to perform various functions enumerated in the exception expressly requires that those unlicensed persons be the ***salaried (i.e., W-2) employees of a* broker**. Thus, a broker who chooses to hire unlicensed people to assist him/her in his/her property management activities cannot avoid the withholding obligations discussed above, nor can s/he hire unlicensed persons from a staffing agency, as the statute requires that the unlicensed persons must be the W-2 employees of a **broker**, and it is doubtful that the staffing agency has a real estate firm broker license.

Unemployment Tax Purposes

Under both the State Unemployment Tax Act (SUTA) and Federal Unemployment Tax Act (FUTA), employers are required to pay unemployment tax for all of their employees. This tax is paid by the employer with no contribution by the employee. Companies are not required under either federal or North Carolina law to pay unemployment tax for independent contractors. The applicable North Carolina law, **G.S. 96-8, Definitions**, states in relevant part:

> (k) The term "employment" does not include:
> 8. Service performed by an individual during any calendar quarter for any employing unit or an employer as an insurance agent or as an insurance solicitor, or as a securities salesman if all such service performed during such calendar quarter by such individual for such employing unit or employer is performed for remuneration solely by way of commission; *service performed by an individual for an employing unit as a real estate agent or a real estate salesman as defined in G.S. 93A-2, provided, that such real estate agent or salesman is compensated solely by way of commission and is authorized to exercise independent judgment and control over the performance of his work.*

Thus, real estate companies have no obligation to pay state or federal unemployment tax for its affiliated brokers, but it will be responsible for paying this tax for all employees of the company, namely the clerical or administrative staff, unless the company leases these employees from a staffing agency. Employers are subject to the law if they have at least one worker in 20 different calendar weeks during a calendar year or have a payroll of at least $1500.00 in any calendar quarter. Employers liable under the employment security law must also display a poster in the workplace, Form NCESC 524, *Certificate of Coverage for and Notice to Workers*, which is also available in Spanish. (Form NCESC 524S).

Workers Compensation Purposes

North Carolina law requires all employers who regularly employ three or more employees in the same business to pay into the State Workers' Compensation Fund. Again, the key here is "employee." If the person is an independent contractor and not an employee, then the company need not pay into the workers compensation fund. However, just because a company's affiliated brokers are independent contractors in the eyes of the IRS does *not* necessarily mean that the NC Industrial Commission, the administrative agency that decides workers compensation questions, will concur. Rather, the Industrial Commission will apply a common law test to determine whether an employer-employee relationship is present. Again, the ***key factor*** *in this analysis is the* ***degree of control****, direct or implied, the company has a right to exert over its workers*.

Most likely, real estate companies will not be responsible for paying workers compensation premiums for its "full" brokers, i.e., not on provisional status, but whether the company must pay premiums for its associated *provisional brokers* is less clear, even though provisional brokers, like full brokers, are classified as independent contractors under 26 USC §3508. The distinction is that full brokers only need to timely pay their annual license renewal fee and complete eight hours of continuing education each year (Update + an elective) and they will have an active license that allows them to legally engage in brokerage activities. The same is *not true* of provisional brokers; they may pay their renewal fee and complete eight hours of continuing education each year, but their license will still be on inactive status until such time as they find a broker-in-charge who is willing to be responsible for them. It is this inability to be active and engage in brokerage without having a broker-in-charge that subjects the provisional broker to greater scrutiny to assess how much control the supervisory broker-in-charge has over the individual.

Understand that the provisional broker will be an independent contractor for IRS purposes, but the Industrial Commission will apply its own common law test to determine whether the provisional broker is an employee or independent contractor. Because of this potential obligation to pay premiums, the General Assembly long ago enacted G.S. 93A-11 which states:

> **G. S. §93A.11. Reimbursement by real estate independent contractor of broker's workers'compensation**.
> (a) Notwithstanding the provisions of G.S. 97-21 or any other provision of law, a real estate broker may include in the governing contract with a real estate broker on provisional status whose nonemployee status is recognized pursuant to section 3508 of the United States Internal Revenue Code, 26 U.S.C. §3508, an agreement for the broker on provisional status to reimburse the broker for the cost of covering that broker on provisional status under the broker's workers' compensation coverage of the broker's business.
> (b) Nothing in this section shall affect a requirement under any other law to provide workers' compensation coverage or in any manner exclude from coverage any person, firm, or corporation otherwise subject to the provisions of Article 1 of Chapter 97 of the General Statutes.

Thus, if companies are required to pay premiums into the workers' compensation fund for its provisional brokers, it may seek reimbursement for those premiums from its provisional brokers but not its full brokers, the assumption being that the company is not liable for workers compensation for its brokers not on provisional status. The company will clearly be liable for paying premiums into the fund for any unlicensed staff who are classified as "employees" unless the company leases these workers from a staffing agency that is the employer of these workers.

The obligation to contribute applies to any "employer" with three or more employees. Thus, a broker who is a one-person shop, but also hires an assistant to answer phones, help with clerical matters, and do various odd jobs for the broker will *not* be responsible for paying workers' compensation premiums as that company only has two individuals working for it. However, the broker will be responsible for withholding applicable social security, Medicare and state and federal taxes on the compensation paid to its employee-assistant and will be obligated to pay unemployment taxes on the individual's wages.

26 CFR Part 31, §31.3508-1: Treatment of qualified real estate agents and direct sellers as nonemployees.

(a) In general. For Federal income and employment tax purposes.

(1) An individual who performs services after December 31, 1982, as a qualified real estate agent or as a direct seller shall not be treated as an employee with respect to such services, and

(2) The service-recipient shall not be treated as an employer with respect to such services.

(b) Qualified real estate agent defined--(1) In general. For purposes of section 3508 and this section, the term "qualified real estate agent" means any individual who is a sales person (including an individual who does not personally make sales but who recruits, trains, or supervises other individuals who make sales) if—

(i) Such individual is a licensed real estate agent,

(ii) Substantially all of the remuneration (whether or not paid in cash) for the services performed by such individual as a real estate agent is directly related to sales or other output (including the performance of services) rather than to the number of hours worked, and

(iii) The services performed by such individual as a real estate agent are performed pursuant to a written contract between such individual and the service-recipient and the contract provides that such individual will not be treated as an employee with respect to such services for Federal tax purposes.

(2) Services performed as a real estate agent. For purposes of this section, the services performed by an individual as a real estate agent include any activities that customarily are performed in connection with the sale of an interest in real property. Such services include the advertising or showing of real property, the acquisition of a lease to real property, and the recruitment, training, or supervision of other real estate sales persons. Such services also include the appraisal activities of a licensed real estate agent in connection with the sale of real property. Services performed as a real estate agent do not include the management of property.

.....

(d) Substantially all remuneration directly related to sales or other output--

(1) Substantially all remuneration--(i) In general. The requirement of paragraph (b)(1)(ii) or (c) (1)(ii) of this section is satisfied for any calendar year with respect to the services described in such paragraph if at least 90 percent of the total remuneration, including advances and draws (except as provided in paragraph (d)(1)(ii) of this section), received by the individual from the service-recipient for performing such services

during that calendar year is directly related to sales or other output rather than to the number of hours worked.
(ii) Repayment of advances or draws. For purposes of paragraph (d)(1)(i) of this section, total remuneration received by an individual does not include any portion of an advance or draw that is repaid directly or indirectly (including repayment by a debit against the individual's account with the service- recipient) pursuant to a binding written agreement which on the date the advance or draw is received requires repayment of the amount by which such advance or draw exceeds the amount which is directly related to sales or other output (as defined in paragraph (d)(2) of this section). The determination of whether any amounts not excluded under this paragraph (d)(1)(ii) from the total remuneration received by an individual is directly related to sales or other output for purposes of
paragraph (d)(1)(i) of this section is made on the basis of all the facts and circumstances (see paragraph (D)(2)(i) of this section).
(2) Directly relating to sales or other output--(i) In general. An item of remuneration is directly related to sales or other output if that item is paid, awarded, or credited to the individual on the basis of the individual's services with respect to one or more specific sales transactions or the accomplishment of one or more specific tasks rather than on the basis of the number of hours worked. Whether an item of remuneration is directly related to sales or other output shall be determined on the basis of all the facts and circumstances. For purposes of this section an item of remuneration that is in the nature of salary, that is, a fixed periodical compensation paid for services rendered without regard to the amount of services rendered, shall be treated as an item or remuneration that is paid, awarded, or credited on the basis of the number of hours worked.
(ii) Directly related to sales or output of some other person. For purposes of this section, remuneration received by an individual based on the sale or productivity of some other individual shall be treated as directly related to sales or other output if it was paid, awarded, or credited on the basis of such other individual's services with respect to one or more particular sales transactions or the accomplishment of one or more specific tasks.
(iii) Remuneration received from a pool. Remuneration received by an individual under an arrangement whereby a service-recipient pools that remuneration of several individuals and a portion of the aggregate pooled remuneration is periodically distributed to each pool participant shall be treated as directly related to sales or other output only to the extent that the amount of remuneration received by that individual from the pool does not exceed the amount of remuneration that, in the absence of the pool arrangement, such individual would have received on the basis of the individual's services with respect to one or more specific sale transactions or the accomplishment of one or more specific tasks. Amounts received from the pool in excess of the amount that person would have ordinarily received for performing services in connection with such specific sales transactions or specific tasks are not directly related to sales or other output.

(e) Written contract requirement--
(1) In general. Except as otherwise provided in paragraph (e)(2) of this section, a written contract that states that the individual will not be treated as an employee without specifically stating "for Federal tax purposes" does not meet the written contract requirements set forth in paragraph (b)(1)(iii) and (c)(1)(iii).
(2) Existing contracts--(i) In general. A contract which—

(A) Is in effect on or before February 28, 1983, and

(B) States that the individual performing the services will not be treated as an employee but does not specifically include the phrase "for Federal tax purposes," will be deemed to satisfy the written contract requirement if the service-recipient furnishes to the individual performing the services a written notice that specifically states that the individual will not be treated as an employee "for Federal tax purposes."

(ii) Date contract requirement deemed satisfied. If the notice described in paragraph (e)(2)(i) of this section is mailed or otherwise furnished on or before February 28, 1983, the written contract requirement shall be deemed satisfied as of the date of the original contract. If the notice is furnished after the date, the written contract requirement is deemed satisfied as of the date the notice is furnished.

(g) Definitions --
(5) Service-recipient. The term "service-recipient" means the person (other than a client or customer) for whom the services as a qualified real estate agent or direct seller are performed (e.g., a real estate firm or a company whose consumer products are sold door-to-door).

(h) No inference. The fact that an individual does not qualify under section 3508 and this section as a qualified real estate agent or as a direct seller with respect to any services does not create an inference that such individual is an employee or the service-recipient is an employer with respect to such services.

(j) Dual services--(1) In general. Section 3508 shall apply only with respect to services performed as a qualified real estate agent or a direct seller. Whether an individual is treated as an employee or as a self-employed individual with respect to services other than those performed as a qualified real estate agent or a direct seller shall be determined under common-law principles.

(2) Examples. The following examples illustrate the principles set forth in this paragraph (j).

Example (1). A is a licensed real estate agent who performs services as a real estate agent pursuant to a written contract described in paragraph (b)(1)(iii) of this section. In addition to performing services as a real estate agent A performs general bookkeeping duties for the same service-recipient. All of the remuneration for the services performed as a real estate agent is directly related to sales. A will be treated as a nonemployee under section 3508 only with respect to A's services as a real estate agent. Whether A is treated as an employee or as a self-employed individual with respect to the bookkeeping duties will be determined under common-law principles.

Example (4). Assume all the requirements of section 3508(b)(1) and paragraph (b) of this section are satisfied with respect to A, a real estate agent, except that A did not obtain a real estate license until March 29. The license was valid for the remainder of the year. A is treated as self-employed under section 3508 for that portion of the year beginning on March 29. Whether for Federal tax purposes A is to be treated as self-employed for the other portion of the year shall be determined under common law.