

REAL ESTATE

Real Estate Brokerages, the Labor Law and Outsourcing HR

By Andrew Lieb

Associate real estate brokers and real estate salespersons (cumulatively, “salesperson” or “salespersons”) generally work as independent contractors who are both statutorily and contractually associated with their real estate brokerage firm (hereinafter, “brokerage”). *RPL* §440(5). This independent contractor relationship is at the option of the brokerage, pursuant to the Real Estate License Law, because 19 NYCRR §175.27 expressly takes no position in defining the relationship between salesperson and brokerage as independent contractor or employee. Further, the Internal Revenue Code, at 26 USC §3508(b)(1), provides an express safe harbor mechanism for the brokerage to define a salesperson as an independent contractor and almost every brokerage leverages such safe harbor to associate with their salespersons. Moreover, brokerages are aware that state law operates under a multi factor-based control test to define an employment relationship (i.e., for purposes of taxes, workers’ compensation, benefits and the like) and as such, the brokerages set limits on their rights of control over

their salespersons’ activities within their independent contractor agreements. *Gallagher ex rel. Gallagher v. Houlihan Lawrence Real Estate*, 259 AD2d 853 (3d Dept. 1999). In all, these independent contractor relationships have become a hallmark of the real estate brokerage community.

Nonetheless, brokerages cannot leverage the independent contractor relationship for their office staff, such as the brokerage’s managers, bookkeepers, administrative assistants, information technology workers, public relations officers, and the like. Further, many salesperson-independent contractors hire their own support staff, which is particularly prevalent when salespersons group together in subsets of the brokerage, called a team, which team shares resources, costs and profits. 19 NYCRR 175.25(a)(2). In these circumstances, both the brokerage and the salesperson/team are almost certainly acting as an employer under both federal and state law. However, these real estate professionals are ill equipped to manage the employment relationship. So,



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what should they do?

There are two outsourcing options for the employment relationship—the Professional Employer Organization (hereinafter “PEO”) and the Administrative Services Organization (hereinafter “ASO”). Both options provide human resources (hereinafter “HR”) support while purportedly complying with the law (i.e., payroll, tax compliance, administration, insurance, workers’ compensation and employee benefits). The key difference between these options is that the PEO is a co-employer where the ASO is a consultant.

A PEO is statutorily created by Article 31 of the state’s Labor Law (New York Professional Employer Act) and also under the Internal Revenue Code, at 26 USC 3511, where the PEO is designated as certified by the Secretary of the Treasury. Pursuant to these statutes, a PEO is a co-employer, which must “perform[] services for a customer pursuant to a contract” where the PEO assumes responsibility for the “payment of wages . . . reporting, withholding, and paying any applicable taxes . . . employee benefits

. . . recruiting, hiring, and firing workers in addition to the customer’s responsibility . . . [and] maintain[ing] employee records.” In fact, the “responsibilities for worksite employees, including those of hiring, firing and disciplining, [must be] expressly allocated by and between the professional employer organization and the client in the agreement.”

In contrast, an ASO is not a function of statute and is not a co-employer. Instead, an ASO offers a suite of HR services, but the employer retains its status as the employer of record and reporting is done through the employer’s Employer Identification Number (hereinafter, EIN), not the ASO’s EIN as would occur with a PEO.

Therefore, it appears that a PEO is the better option for real estate professionals because it’s a comprehensive service where the brokerage or salesperson/team can outsource its employer status (i.e., the EIN). However, this rationale is flawed. While a PEO may outsource the EIN, it does not outsource the employer’s exposure (i.e., co-employers are both exposed). In fact, the Federal Court for the Northern

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Suffolk County Traffic Violations Agency Community Programs (Continued from page 3)

the motorist's driving record. If a motorist continues to drive in this reckless manner, the prosecution will ask the judge to suspend or even revoke the motorist's privilege to drive.

As part of a pre-plea, participants voluntarily agree to enroll and complete the recommended diversion program(s). The initial charge may be reduced and/or points may be reduced based on the individual's participation in the program including a Pre and Post-quiz. The participants also receive handouts to take home (available in English and Spanish). After the individual completes the program, they receive a certificate of completion and the EAC staff will then submit to TPVA the attendance sheet, a class update including participation as well as the scores.

Driver Safety Program — DSP Program (Drive Safe Program)

The three-hour Drive Safe Program discusses responsibility, the motorist's actions and consequences of these actions. Included in this program are presentations by a SCPD Highway Patrol Officer; Dr. James A. Vossinkle, Chief Trauma, Emergency Surgery and Surgical Critical Care doctor at Stony Brook University Hospital; health educators, an attorney and a judge. Topics include but will not be limited to the judiciary system and occupant protection, which include seat belt use, excessive speed, passenger distraction, cell phone usage, text messaging, loud music, night driving, peer pressure, overconfidence and other issues impacting young, inexperienced drivers.

Child Passenger Safety Program

S.C.O.P.E.: Second Chances in Occupant Protection for Everyone. Motor Vehicle crashes are the leading

cause of death among children in the United States. In 2012 there were 1,329 tickets issued for non-restrained children (under the age of 16). Motorists who receive a citation for not having their child properly restrained in a motor vehicle, either by using a Child Safety restraint or seat belt, have the option to voluntarily attend a three-hour diversion program. The Second Chances in Occupant Protection for Everyone program, or SCOPE, is an educational class, for parents and caregivers focusing on misuses and injury prevention. The structure of this class is designed to improve the use of safety restraints for all motor vehicle occupants and promote safer driving practices through education on topics such as seat belt safety, seat belt laws, airbag impact, proper installation and use of child passenger safety restraints. If the individual needs a seat and meet the eligibility requirements, they will be referred to our SAFETSTART distribution program.

Unlicensed/Improperly Licensed Driver Program.

EAC and TPVA have jointly developed an eight-hour program that provides education and risk awareness to motorists charged with the unlicensed operation of a motor vehicle. This program includes a six-hour driver's safety course that is approved by the New York State Department of Motor Vehicles. Regardless if an individual possesses a license, every participant that completes this program will receive a certificate issued by American Safety Inc. Participants are also introduced to a Suffolk County police officer who will speak to the participants about operating a vehicle without a license and law enforcement's role. This program

includes a presentation from an attorney who provides a brief overview of legal representation. Participants are also introduced to the MV-44.1 and MV 44 DMV forms – otherwise known as Proof of Identity and the application for Permit, Driver's License and Non-Driver ID Card, respectively. Some participants may even be eligible to apply for a Non-drivers ID card or a license and are directed to review the information and go to their local DMV office.

Diversion added in 2017

H.E.R.O.E.S. Diversion. EAC, SCPD and TPVA have jointly developed an eight-hour program that provides education and risk awareness to veterans appearing in Traffic Court who agree to attend the program. This program includes a six-hour driver's safety course that is approved by the New York State Department of Motor Vehicles and an additional two hours of educational material teaching the veterans responsibility behind the wheel, the veterans' actions and consequences of their actions. These programs seek to modify driving behaviors and return a safer driver to the road.

Outreach

Veteran's Court. Veteran's Docket Day (VDD) is designed to offer a specialized conference for veterans with open traffic infractions. Participants are afforded a more comprehensive conference with an anticipated 10-15 minutes being allowed for each conference with a prosecutor.

The goal of the Veterans Traffic Court ultimately is to provide and facilitate a complete avenue of reform and assistance. This program differs from a drug courts within a criminal

court venue as the Traffic Court's program will help resolve infractions which may be the underlying cause of the criminal charge, i.e. aggravated unlicensed operation "VTL Section 511." If a motorist is ticketed for an Aggravated Unlicensed Operation of a Motor vehicle, the motorist is suspended, due to unpaid or unanswered tickets. In many cases, those tickets are under the jurisdiction of the Traffic Court. There are no additional costs to the public to implement this program.

Youth Court. National studies and Suffolk County statistics clearly show that inexperience is the most common factor in crashes involving young drivers. Those in the 16-20 age group are involved in disproportionately high numbers of fatal accidents according to the National Highway Traffic Safety Administration. For public safety concerns, new drivers will not be offered a plea bargain at the agency. Any driver either: 18 or younger; or with a junior license; or with a permit; or with a probationary license will not be offered a plea bargain unless there is participation in the Youth Court program.

The Youth Court program will provide mandatory safe driving diversion programs and other assistance with the input from, participation with, and the cooperation of the youngsters' family, while helping to protect the general public from unsafe driving habits commonly associated with inexperienced, young, new drivers.

Note: Paul J. Margiotta, M.B.A., J.D., is the executive director of the Suffolk County Traffic Parking Violations Agency. He is the co-chair of the SCBA Traffic & Parking Violations Agency Committee.

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District of New York addressed the disadvantages that stem from the co-employer relationship when hearing an employee's sexual harassment claim in the case of *Senecal v. B.G. Lenders Service LLC*, 976 F.Supp.2d 199 (2013). In that case, the employee was harassed by the employer and made complaints about the harassment to the PEO. The court looked to the allocation of "the traditional duties and rights of an employer" between the PEO and the employer and explained that this may cause confusion for employees about who is in charge of what. In *Senecal*, the court found that a PEO and the

employer shared an identity of interest, which allowed a plaintiff "to bring Title VII claims against a defendant in federal court despite having not named that defendant in their administrative charges." Operative to the court's finding was the fact that the PEO's contract provided extensive responsibilities "to oversee and manage its company's response to workplace discrimination claims." Therefore, a timely EEOC filing against the employer saved the plaintiff from otherwise certain dismissal on a summary judgment motion brought by the PEO, which motion was based upon an untimely EEOC filing

against such PEO. This is not to say that an ASO would have fared any better in seeking to have the case dismissed. In fact, the court expressly found that "[a]ny differences between a co-employer relationship [PEO] and an Administrative Services Organization [was] not relevant to" a summary judgment motion seeking dismissal for an untimely EEOC filing.

As a result, real estate professionals and anyone else enlisting the services of a PEO or ASO should abide by the proverb of trust, but verify. To have staff, one must ensure compliance regardless of outsourcing such compli-

ance. In this vein, enlisting a PEO or ASO does not obviate the need for employment counsel for real estate professionals, but instead, should be the key service that employment counsel is hired to advise upon.

Note: Andrew M. Lieb is the Managing Attorney at Lieb at Law, P.C., a law firm with offices in Smithtown and Manhasset. He is a past co-chair of the Real Property Committee of the Suffolk Bar Association and has been the Special Section Editor for Real Property in The Suffolk Lawyer for years.

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