

To: Unemployment Insurance Advisory Council  
From: Andy Rubsam  
Cc: Janell Knutson  
Date: December 17, 2015  
Re: Proposal to create a UI exception for real estate licensees (2015 AB 456 / 2015 SB 375)

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### **Current Law**

Wisconsin unemployment insurance law currently defines “employment” to exclude service “by an individual for a person as a real estate agent or as a real estate salesperson, if all of the service performed as a real estate agent or sale person by the individual for the person is performed for remuneration solely by way of commission.”<sup>1</sup>

Under current federal tax law, a “qualified real estate agent” is not treated as an employee for tax purposes, if the worker meets the following criteria:<sup>2</sup>

1. The worker is a licensed real estate agent.
2. Substantially all of the remuneration for the services performed by the worker as a real estate agent is directly related to sales or other output rather than to the number of hours worked.
3. The services performed by the worker are performed pursuant to a written contract between such individual and the person for whom the services are performed and the contract provides that the worker will not be treated as an employee with respect to such services for Federal tax purposes.

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<sup>1</sup> Wis. Stat. § 108.02(15)(k)7.

<sup>2</sup> 26 USC § 3508(a)

For the purposes of the qualified real estate agent definition in federal law, proposed federal regulations would define “substantially all” to mean “90 percent of the total remuneration, including advances and draws.”<sup>3</sup> The proposed federal regulation is not final.

### **Legislative Proposal**

The Legislature has introduced a bill that would exclude real estate licensees from the definition of “employee.” The proposal would create a new statute, Wis. Stat. § 452.38 in the Real Estate Practice chapter, and would not amend chapter 108. Under this proposal, real estate licensees would not be considered employees for Unemployment Insurance law, Worker’s Compensation law, Wage and Hour law, “under any rule, or under any other law.”<sup>4</sup> Under the proposal, a real estate licensee would not be an employee if both of the following conditions are satisfied:

1. A written agreement has been entered into with the firm that provides that the licensee shall not be treated as an employee for federal and state tax purposes.
2. Seventy-five percent or more of the compensation related to sales or other output, as measured on a calendar year basis, paid to the licensee pursuant to the written agreement is directly related to the brokerage services performed by the licensee on behalf of the firm.

### **Department Concerns with Legislative Proposal**

This proposal could result in an unexpected federal tax for Wisconsin employers. If federal law is interpreted to mean that “substantially all” means at least 90%, as set forth in the proposed federal regulation, federal law would be more stringent than state law. Under the

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<sup>3</sup> Treatment of Qualified Real Estate Agents and Direct Sellers as Nonemployees; Determination of Employer Liability for Certain Employment Taxes; Information Reporting of Direct Sales and Payments of Remuneration for Services, 51 FR 619-01. (The proposed regulation is 26 CFR § 31.3508-1(d)(1).)

<sup>4</sup> 2015 AB 456 § 174.

proposed law change, a real estate licensee whose compensation is 75% to 89% related to sales output (e.g. commissions) would not be an employee for Wisconsin unemployment insurance law purposes but could be considered an employee for federal tax purposes.

The result would be that the wages and commissions paid to real estate licensees could not be used to establish unemployment insurance benefits. However, the wages and commissions would be taxed at the full federal unemployment tax rate of 6.0% on the first \$7,000 paid to the licensee. The employer would pay the full federal tax rate because the employer would not pay any Wisconsin state unemployment taxes, resulting in a loss of the 5.4% tax credit against the employer's federal unemployment tax.

The proposal would also be burdensome to administer for the department. The department will need to create new forms and train staff to request additional information from employers regarding the written agreement and the breakdown of the amounts paid to real estate licensees in order to determine whether the licensees are employees or not.

Proposed s. 452.38(3) provides that "in the case of an individual who is engaged as both an independent contractor and an employee of the same firm, sub. (1) applies only with respect to activities covered under the written agreement...." Under Wisconsin unemployment insurance law, workers are either employees of an employer or not.<sup>5</sup> If this proposal creates a scenario where a worker could be an employee and an independent contractor of an employer, it will be difficult for the department to administer this law.

It is unclear whether a claimant would be entitled to benefits based on part of their wages if, for example, they perform services outside the scope of the written agreement that is

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<sup>5</sup> Wis. Stat. § 108.02(12).

contemplated by proposed s. 452.38(1)(a). The department suggests submitting this proposed legislation to the United States Department of Labor for federal conformity review.

Based on the department's concerns with this proposal, the department requests that the Legislature remove the references to chapter 108 (and the references to "any rule, or under any other law, or in any action or proceeding under the common law") from AB 456 / SB375.

### **Other States' Laws**

For comparison, Minnesota law is similar to Wisconsin's current law and excludes the services of real estate salespersons if all of their wages are solely commission-based.<sup>6</sup> Michigan law excludes the services of real estate salespersons "who are compensated principally or wholly on a commission basis."<sup>7</sup> Illinois law excludes the services of real estate salespersons "to the extent that such services are compensated for by commission."<sup>8</sup> These provisions are all contained in the respective state's unemployment insurance law.

### **Current Legislative Status**

The Assembly conducted an executive session on AB 456 on December 10, 2015.

The Senate version (SB 375) has been referred to the Insurance, Housing, and Trade Committee but no further action has been taken on the Senate version.

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<sup>6</sup> Minn. Stat. § 268.035 Subd.20(30).

<sup>7</sup> Mich. Stat. § 421.43(h).

<sup>8</sup> 820 ILCS 405/217(a).

1 and presence of a licensee, and may not provide any services at an open house for  
2 which a license is required under this chapter.

3 **SECTION 174.** 452.38 of the statutes is created to read:

4 **452.38 Independent contractor relationship.** (1) Notwithstanding the  
5 applicable definitions or meanings of employee under chs. 102, 103, 104, 108, and  
6 109, under subch. X of ch. 71 and subch. II of ch. 111, under any rule, and under any  
7 other law, and in any action or proceeding under the common law, a licensee shall not,  
8 under ch. 102, 103, 104, 108, or 109, under subch. X of ch. 71 or subch. II of ch. 111,  
9 under any rule, or under any other law, or in any action or proceeding under the  
10 common law, be considered an employee of a firm if all of the following are satisfied:

11 (a) A written agreement has been entered into with the firm that provides that  
12 the licensee shall not be treated as an employee for federal and state tax purposes.

13 (b) Seventy-five percent or more of the compensation related to sales or other  
14 output, as measured on a calendar year basis, paid to the licensee pursuant to the  
15 written agreement referenced under par. (a) is directly related to the brokerage  
16 services performed by the licensee on behalf of the firm.

17 (2) (a) Subsection (1) applies notwithstanding the requirements and  
18 responsibilities of a firm under s. 452.132 and any rules promulgated by the board.

19 (b) Subsection (1) applies regardless of the licensee's status as a supervising  
20 broker under s. 452.132 and any actions taken by the licensee as a supervising broker  
21 under s. 452.132.

22 (3) In the case of an individual who is engaged as both an independent  
23 contractor and an employee for the same firm, sub. (1) applies only with respect to  
24 activities covered under the written agreement referenced under sub. (1) (a).

25 **SECTION 175.** 452.40 of the statutes is created to read:

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