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NJ Supreme Court Holds That NJ Wage Payment Law is Inapplicable to Real Estate Salesperson Who Has Independent Contractor Agreement with Broker

Barry S. Goodman and Conor J. Hennessey
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What You Need to Know

- The New Jersey Supreme Court ruled that a written agreement between a real estate broker and a salesperson, in which the salesperson is defined as an independent contractor, determines the nature of that relationship and must be enforced by the courts.
- The Court held that a written independent contractor agreement excludes the salesperson from the New Jersey Wage Payment Law, which governs compensation paid to employees but does not apply to independent contractors.
- Following five years of litigation, the Court enforced the intent of the New Jersey Brokers Act in its ruling, rejecting the Appellate Division's 2023 finding in the matter.

On May 13, 2024, the New Jersey Supreme Court issued its decision in a class action lawsuit known as *James Kennedy, II v. Weichert Co.*, conclusively finding that for the purpose of determining whether a real estate salesperson is an independent contractor or an employee under the New Jersey Wage Payment Law, the ABC Test, which is set forth in the New Jersey Unemployment Compensation Law (and which the Court previously held in another case should be used to determine if a worker is an employee or independent contractor under the Wage Payment Law) cannot be applied to a real estate salesperson who enters into a written contract with the salesperson's broker as an independent contractor.

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The ABC Test is a three-pronged analysis utilized to determine if a worker can be considered an independent contractor. Classification under the ABC test is critical to employers because they have greater responsibilities to employees as opposed to independent contractors.

The Supreme Court's decision, which follows five years of litigation in this case, preserves the well-established and long-standing practice of real estate salespersons contracting with brokers as independent contractors. It cements that the designation of a real estate salesperson as an employee or independent contractor in the required written agreement between a broker and a salesperson determines the nature of the relationship notwithstanding any other law, rule or regulation to the contrary.

Relying on the plain language of Section 3.2 of the New Jersey Brokers Act, the Supreme Court rejected the finding of the New Jersey Appellate Division that the designation in the written contract between a real estate salesperson and the salesperson's broker is just one of several factors to be considered when determining whether a real estate salesperson is an independent contractor or an employee. The Supreme Court recognized the plain and unambiguous language of Section 3.2 and enforced the statute's intent by finding that a written agreement entered into between a real estate salesperson and the salesperson's broker that states that the salesperson is an independent contractor must be enforced.

The Supreme Court's ruling in this case is significant, as a loss would have resulted in broad-based changes for New Jersey's real estate brokerage industry. Exemption from the New Jersey Wage Payment Law allows real estate salespersons who contract as independent contractors to write-off many of their costs. This includes compensation and other benefits for staff who assist the salesperson, costs related to vehicles used for business purposes, depreciation of equipment, advertising costs, meals and travel related to brokerage activities, attendance at association conventions, continuing education expenses, certain insurance costs, subscriptions and dues, and licensing fees. Real estate salespersons working as independent contractors can also retain the benefit of working for themselves and setting the hours that they are available, including whether to work on a full-time, part-time, or occasional basis.

If the Supreme Court had deemed all New Jersey real estate salespersons to be "employees" for purposes of the New Jersey Wage Payment Law, real estate brokerages of all sizes would undoubtedly have laid off many full-time and part-time salespersons to avoid having to comply with the New Jersey Wage Payment Law. It would likely have not been worthwhile for brokerages to put part-time real estate salespersons on their payroll and pay their marketing fees, membership fees, and other costs that a broker typically pays upfront and then charges back to its salespersons as provided in the independent contractor agreements.

The authors of this Alert, **Barry S. Goodman** and **Conor J. Hennessey**, are partners in the firm's Litigation Department and Real Estate Brokerage Practice Group. Mr. Goodman successfully argued this case on behalf of amicus curiae New Jersey Realtors®, with Mr. Goodman of counsel and on the brief, and Mr. Hennessey on the brief. Please contact them with questions concerning this case or to discuss your specific business circumstances.

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