

Commissioned Real Estate Salespersons How to Identify an Employer-Employee Relationship

February 2001

This publication is provided as a guide only. It is not intended as a substitute for the *Employer Health Tax Act* and Regulations.

This guide explains how Ontario's Employer Health Tax (EHT) applies to commissioned real estate salespersons and, more specifically, how to identify whether an employer-employee relationship exists between a real estate salesperson and a real estate broker.

General

Employers are required to pay EHT based on remuneration paid to employees who report for work at a permanent establishment in Ontario, and to employees who do not report for work at a permanent establishment but who are paid from or through the employer's permanent establishment in Ontario.

Real estate industry - background

In general, real estate transactions are conducted by registrants under the *Real Estate and Business Brokers Act* who act as real estate brokers (brokers) or real estate salespersons (salespersons). If the salesperson is an employee of the broker, the broker is required to pay EHT based on remuneration paid to the salesperson. Therefore, it is necessary to establish whether the salesperson is an employee or is self-employed.

If it is determined that an employer-employee relationship exists between a salesperson and a broker, the broker is required to remit EHT on remuneration paid to the salesperson.

If a salesperson is determined to be a self-employed individual and, therefore, an employer-employee relationship does not exist, the payments a broker makes to the salesperson are not subject to EHT for employers. However, the salesperson may be subject to EHT for Self-employed Individuals for years prior to 1999. Effective January 1, 1999, the Employer Health Tax for Self-employed Individuals was eliminated.

The Ministry does not have a generic industry position on whether an employer-employee relationship exists between a real estate broker and a real estate salesperson. The following is meant only as a guideline.

Canada Revenue Agency's (CRA) Employment Insurance (EI) and Canada Pension Plan (CPP) rulings

A CRA ruling is an official decision that is issued by an authorized officer of CRA and can be requested by an employer or a worker. A ruling determines whether or not a worker is in pensionable employment (CPP) and/or insurable employment (EI). A ruling also indicates whether a worker is an employee or self-employed.

For EHT purposes, the ministry will accept a CRA CPP/EI ruling regarding the employment status of a worker that has been issued either in the current or the four immediately preceding years. A ruling will be accepted by the ministry only as it applies to the broker and the salesperson(s) named in the ruling.

Canada Revenue Agency's (CRA) Employment Insurance (EI) and Canada Pension Plan (CPP) guidelines

CRA has developed certain criteria to determine the status of a real estate salesperson. The ministry will follow these criteria in making its determination as to whether an employer-employee relationship exists.

Self-employed status

A salesperson will be considered as self-employed if all of the criteria in either (A) or (B) are met (i.e. the broker would not be subject to EHT based on remuneration paid to the salesperson):

A) under his/her contract, the salesperson:

- i) is legally entitled to the full amount of the gross commissions
- ii) is required to pay a realistic fixed amount to a broker on a monthly, annual or other basis for administrative and operating costs

or

B) under his/her contract, the salesperson:

- i) is legally entitled to the full amount of the gross commissions
- ii) is required to pay to the broker a fixed percentage of his/her gross commissions to cover administrative and operating costs
- iii) sets his/her own commission rate for the sale of his/her listings.

Notes:

- i) The existence of the above criteria should be supported by a written contract or working agreement and/or any other evidence.
- ii) If the salesperson pays a realistic fixed amount to the broker for administrative and operating costs and, in addition, pays a fixed percentage of the commission to the broker, then this would meet the conditions in (A).
- iii) If the contract between the salesperson and broker includes a clause that the commission will be split between the listing and selling salespersons, subject to trade and customs of the industry, such a clause would not preclude the salesperson from being considered self-employed if all of the other conditions in (A) and (B) are met.

Employee status

If the criteria stated above are not met, Canada Revenue Agency will consider the salesperson to be an employee. The Ministry of Revenue, however, will investigate further in order to establish whether a relationship between a salesperson and a broker is, in fact, an employer-employee relationship. The Ministry of Revenue will apply the four common law tests described below and will examine all the facts of the situation to determine the substance of the relationship between the parties.

Common law principles

In order to determine whether a worker is an employee or self-employed, reference must be made to the common law principles. The terms and conditions of the worker's employment are examined and analysed as they relate to the following four factors: (a) control (b) ownership of tools (c) chance of profit/risk of loss and (d) integration. It is important to note that one factor alone is not conclusive in the determination.

a) Control test

The control test is used to determine whether a person is in a position to order or require not only what work is done, but also how it is done. Generally, in an employer-employee relationship, the employer controls, directly or indirectly, the way the work is done and the work methods used. The employer assigns specific tasks that define the real framework within which the work is to be done. The payer exercises control if he has the right to hire or fire, and decide where, when and how the work will be done. If such is the case, then the hirer clearly exercises control over the worker, who may then be considered to be an employee for EHT purposes.

It is not necessary that the control be exercised, only that it can be exercised.

Some of the questions the ministry may ask in order to evaluate control include:

- i) Does the broker require a minimum commitment from the salesperson in terms of hours devoted to the business?
- ii) Is the salesperson provided with any training by the broker?
- iii) Does the broker reserve the right to reject any listing deemed unsatisfactory?
- iv) Do commission rates below a certain threshold have to be authorized by the broker?
- v) In the event of termination of the relationship between the broker and the salesperson, do all listings remain the property of the broker?
- vi) Does the salesperson receive advances on commissions earned?
- vii) If the salesperson is absent from work (e.g. on holiday) are his/her listings redistributed to other salespersons in his/her absence?
- viii) Does the broker set the guidelines regarding work redistribution in a salesperson's absence?
- ix) If another salesperson covers for the absent salesperson, does the broker determine how the compensation arrangements with the other salesperson will be effected?
- x) If the broker severs the relationship between him/herself and the salesperson, are there any legal consequences

b) Ownership of tools

The main points to consider are:

- the amount invested
- the value of equipment and tools
- the rental and maintenance of equipment and tools.

In an employer-employee relationship, the employer generally supplies the equipment and tools required by the employee. In addition, the employer covers the following costs related to their use: repairs, insurance, transport, rental, and operation.

- i) Does the broker reimburse the salesperson for some of his/her expenses (e.g. automobile and advertising costs)?
- ii) Does the broker provide office space, administrative services, stationery, etc, at a cost to the salesperson that is below market value?
- iii) Is the salesperson a shareholder of the brokerage?

c) Chance of profit and risk of loss Generally, if an employer-employee relationship exists, the employer alone assumes the risk of loss. The employer also generally covers operating costs, which may include office expenses, employee wages and benefits, insurance premiums, and delivery and shipping costs. The employee assumes little or no financial risk and is entitled to his/her full salary or wages regardless of the financial health of the business. To evaluate this test, the ministry may ask:

- i) Is the salesperson paid a combination of salary/wage and commission?
 - ii) Is there a guaranteed wage minimum?
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d) Integration or organization test The integration or organization test examines whether the tasks performed by a salesperson form an integral part of the business (i.e. an employer-employee relationship exists). Integration has to be considered from the point of view of the salesperson not the broker. Where the salesperson integrates his/her activities with the commercial activities of the payer, an employer-employee relationship probably exists. The worker is acting on behalf of the employer, he/she is connected with the employer's business and is dependent on it.

To evaluate this test, the ministry may ask:

- i) Is the salesperson economically dependent on the organization?
 - ii) Is the salesperson also acting in the capacity of a registered broker?
 - iii) Is there any additional remuneration (e.g. vacation pay, sick pay, bonus for high performance)?
 - iv) Does the salesperson receive any fringe benefits?
 - v) Does the salesperson receive severance pay on termination of the contract?
 - vi) Is the broker required to carry insurance coverage to protect against losses, costs, damages, etc. attributable to the wrongful or negligent act(s) of the salesperson?
 - vii) Does the salesperson manage the operations of the brokerage?
 - viii) Does the salesperson have the chance to profit from sound management of the brokerage?
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Written interpretations

To obtain a written interpretation on a specific situation not addressed in this publication, please send your request in writing to:

Ministry of Revenue
Tax Advisory Services Branch
Income Tax Related Programs Section
Employer Health Tax
33 King Street West, 3rd Floor
Oshawa ON L1H 8H5

**Related
publications**

Other publications which provide further details on this topic include:

How to Identify an Employer-Employee Relationship
Placement Agencies and their Workers - How to Identify an
Employer-Employee Relationship

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Comment reconnaître une relation employeur-employé ».*

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