Are Your Loan Officers Employees or Independent Contractors

Article by: *Robin Gronsky*

Many mortgage lenders/brokers treat their loan officers (who are their salespersons) as independent contractors. Those loan officers are paid on a commission based on the successful funding of a loan. The mortgage lenders/brokers pay the loan officers either as each transaction closes or on a periodic basis. The amount paid to the loan officer contains no deduction for federal, state or local taxes. Frequently, the loan officer does not receive any benefits, such as company-paid health insurance or paid sick or vacation time. At the end of each year, the mortgage lenders/brokers issue IRS Form 1099s to their loan officers.

As a mortgage lender/broker, you cannot classify whether your loan officers are independent contractors or employees. That task has been given to the Internal Revenue Service, the U.S. Department of Labor, your state unemployment insurance agency, your state department of labor and your state workers compensation insurance agency. Although each agency has its own guidelines, typically the determination turns on the degree of control that the mortgage lender/broker exercises and the degree of independence that the loan officer enjoys. When the mortgage lender/broker has the right to dictate what will be done and how it will be done, then the loan officer is an employee. The government agencies look at facts concerning the behavioral control of the loan officer, the financial control of the loan officer and the relationship between the mortgage lender/broker and the loan officer. The Internal Revenue Service has a 20 factor test to determine whether an employer/employee relationship exists. Such factors include whether the loan officer has to comply with instructions, gets training from the mortgage lender/broker, works exclusively for the mortgage lender/broker, whether the loan officer can independently hire assistants, whether the loan officer has set hours of work, whether there is a continuing relationship, and whether regular reports must be given to a supervisor. The IRS seems to have a bias towards finding an employer-employee relationship. Even if the mortgage lender/broker has a written agreement with the loan officer classifying him/her as an independent contractor, that is not binding on any federal or state agency.

If you have been treating your loan officers as independent contractors, when in reality, they pass the 20 factor test as employees, what are the ramifications? If the Internal Revenue Service or Department of Labor find you have misclassified employees, they will require you to pay back withholding taxes plus interest, or they can assess fines that can bankrupt a company, or even file criminal charges against the owners. Once the IRS has come in, other federal and state agencies follow right behind them and assess their fines and penalties as well. If there is anything left, the loan officer can sue for unemployment compensation, retirement benefits, profit sharing, vacation pay, disability or any other benefit that he/she would have received as an employee. Many mortgage companies have gone out of business because they treated many of their loan officers as independent contractors and did not comply with wage-and-hour laws

How does the Internal Revenue Service or Department of Labor find out about you? Usually, a dismissed loan officer will file for unemployment benefits or a disgruntled loan officer will make a telephone call to the agency. And the agency will always follow up.

You should also be aware that the agency that approved your lender/broker license considers the loan officers to be employees because you have responsibility for their actions. Although some states do not require that the loan officers be W-2 employees, they will not care how you classify the loan officer who is in regulatory hot water. The Banking Departments are concerned that your company supervises the people operating under the auspices of your license. This requires that you supervise the activities of your loan officers regardless of whether you pay them as employees or as independent contractors. After all, you are responsible for any violations of the mortgage lender/broker law, rules and policies committed by anyone, including a loan originator, operating under your license. Therefore, it's in your best interests to supervise them.

This Article is designed to be of general interest. The specific information discussed may not apply to you. Before acting on any matter contained herein, you should consult with your personal legal and accounting adviser.Robin M. Gronsky has been practicing law since 1982. She is admitted to practice in New York, New Jersey and Florida.

As a former general counsel of a national mortgage lender, Ms. Gronsky is experienced in corporate matters, mortgage licensing on a nationwide basis, and all facets of real estate transactions.

Ms. Gronsky graduated magna cum laude from the State University of New York at Buffalo and received her J.D. from Boston University School of Law.

Ms. Gronsky's practice is geared to maintain personal contact with her clients and develop a close-working professional relationship over a long period of time. This helps assure that her clients' work will be performed by the lawyer they have chosen.