



**Affiliated Network Services, LLC,**  
Petitioner,

**STATE OF NEW JERSEY  
DEPARTMENT OF LABOR  
AND WORKFORCE DEVELOPMENT**

v.

**New Jersey Department of Labor  
and Workforce Development,**  
Respondent.

**FINAL ADMINISTRATIVE ACTION  
OF THE  
COMMISSIONER**

**OAL DKT. NO LID 01379-2022  
AGENCY DKT. NO. DOL 22-004**

Issued: March 13, 2023

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Pursuant to N.J.S.A. 43:21-14(c), the New Jersey Department of Labor and Workforce Development (the Department or respondent) assessed Affiliated Network Services, LLC (Affiliated or petitioner) for unpaid contributions to the unemployment compensation and State disability benefits funds for the period from 2015 through 2019 (the audit period). Petitioner requested a hearing with regard to the Department's assessment. The matter was transmitted to the Office of Administrative Law (OAL), where it was scheduled for a hearing before Administrative Law Judge (ALJ) Sarah G. Crawley.

The issue to be decided is whether the real estate referral agents whose services were engaged during the audit period by petitioner were employees of petitioner and, therefore, whether petitioner was responsible under N.J.S.A. 43:21-7 for making contributions to the unemployment compensation fund and the State disability benefits fund with respect to those real estate referral agents during the audit period.

Under the UCL (N.J.S.A. 43:21-1 et seq.), the term “employment” is defined broadly to include any service performed for remuneration or under any contract of hire, written or oral, express or implied. N.J.S.A. 43:21-19(1)(A). Once it is established that a service has been performed for remuneration, that service is deemed to be employment subject to the UCL, unless and until it is shown to the satisfaction of the Department either that the service is exempt from UCL coverage under N.J.S.A. 43:21-19(i)(7), (i)9 or (i)10, which contain 27 separate specialized exemptions from UCL coverage, including one at N.J.S.A. 43:21-19(i)(7)(K) for “[s]ervices performed by real estate salesmen or brokers who are compensated wholly on a commission basis,” or that the service and the individual performing the service meet the statutory test for independent contractor status found at N.J.S.A. 43:21-19(i)(6)(A), (B) and (C) - the “ABC test.”

Under the UCL, in order to successfully assert any of the 27 separate specialized exemptions set forth at N.J.S.A. 43:21-19(i)(7), (i)(9), and (i)(10), including the exemption at N.J.S.A. 43:21-19(i)(7)(K), a putative employer must establish not only that the services are covered under the terms of the particular UCL exemption (in this instance, that the services were performed by real estate salesmen or brokers who are compensated wholly on a commission basis), but also that those services are exempt under the Federal Unemployment Tax Act (FUTA), or that contributions with respect to the services are not required to be paid into a state unemployment fund as a condition for a tax offset credit against the tax imposed by FUTA. If the putative employer is unable to successfully assert one of the 27 separate specialized exemptions from UCL coverage and still seeks to avoid responsibility under N.J.S.A. 43:21-7 for making contributions to the unemployment compensation fund and the State disability benefits fund, the putative employer must establish under the statutory ABC test that the workers at issue are independent contractors, not employees. Under the ABC test, a putative employer who seeks to assert exemption from UCL coverage for the services of an individual who it claims to be an independent contractor, has the burden to establish the following with regard to the services and the individual performing those services:

(A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and

(B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

(C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.

N.J.S.A. 43:21-19(i)(6).

The above statutory criteria are written in the conjunctive. Therefore, where a putative employer fails to meet any one of the three criteria listed above with regard to an individual who has performed a service for remuneration, that individual is considered to be an employee and the service performed is considered to be employment subject to the requirements of the UCL; in particular, subject to N.J.S.A. 43:21-7, which requires an employer to make contributions to the unemployment compensation fund and the State disability benefits fund with respect to its employees.

In the ALJ's initial decision, she did not address at all the exemption from coverage under the UCL at N.J.S.A. 43:21-19(i)(7)(K) for "[s]ervices performed by real estate salesmen or brokers who are compensated wholly on a commission basis." Rather, the ALJ moved directly to an analysis under the UCL's test for independent contractor status – the ABC test. Specifically, the ALJ found the following:

Prong "A"

I CONCLUDE that Affiliated has satisfied part "A" of the ABC test. The individuals in question provide a referral for someone seeking real estate services. They receive no supervision from Affiliated, they are not told how to perform their job, when to do it or require them to be anywhere in particular to perform their responsibilities. There is no training provided by Affiliated. Their job is dictated by the custom in the industry and the regulations that require certification by the state. This certification process operates without regard to the agency or the broker with whom they affiliate. They are required to have their own equipment, pay for their own supplies and travel to and from the places where they provide services. There are no benefits provided. They do not perform their services at the offices of Affiliated, and they are free to perform their services when and if, they so desire. And, finally, they are free to terminate their relationship with Affiliated at any time.

Prong "B"

The facts in this case are undisputed that none of the individuals in question report to a petitioner's place of business. If a transaction if (sic) as a result of their referral, they call and/or email Affiliated and receive a check in the mail for commissions. They never go to the place of business of Affiliated.

...

There is no doubt that the service performed by these individuals is performed outside of the office of Affiliated. For the above reasons, I CONCLUDE that petitioner has satisfied part "B" of the ABC test.

Prong “C”

[T]he Court [in Carpet Remnant Warehouse v. new Jersey Dep’t of Labor, 125 N.J. 567 (1991)] directed that the determination [under Prong C] should take into account various factors relating to the [alleged independent contractor’s] ability to maintain an independent business or trade. The suggested factors were: the duration and strength of the [alleged independent contractor’s] business; the number of customers and their respective volume of business; the number of employees; the extent of the [alleged independent contractor’s] tools, equipment, vehicles, and similar resources, and the amount of remuneration each installer received from [the putative employer] compared to that received from [others].

...

Referral agents working for Affiliated are not restricted in any way regarding who they provide services for. They could also freely affiliate with other brokers and end their relationship with Affiliated at any time. They are licensed to be referral agents in New Jersey, and they can choose to be affiliated with any broker licensed in the State of New Jersey. There was no evidence that these individuals were restricted to work for a particular broker. If one goes out of business, they can and will affiliate with another agency. It is not disputed and has been demonstrated that the individuals in question could be employed with any other agency if their relationship with Affiliated was terminated. I therefore CONCLUDE that Affiliated has satisfied part “C” of the ABC test.

Based on the foregoing, the ALJ concluded that the real estate referral agents who performed services for Affiliated during the audit period were independent contractors, rather than employees. Therefore, the ALJ granted the appeal of Affiliated and reversed the Department’s assessment against Affiliated for unpaid contributions to the unemployment compensation and State disability benefits funds. Respondent filed exceptions. Petitioner filed a reply to respondent’s exceptions.

In its exceptions, with regard to the exemption from UCL coverage at N.J.S.A. 43:21-19(i)(7)(K) for “[s]ervices performed by real estate salesmen or brokers who are compensated wholly on a commission basis,” which the ALJ failed to address in her initial decision, respondent asserts that because the exemption applies only to services performed by real estate salesmen or brokers, and does not expressly list services provided by real estate referral agents, Affiliated cannot successfully assert the exemption with regard to the individuals who exclusively performed real estate referral services and never engaged in real estate sales.

Relative to each prong of the ABC test, respondent maintains the following:

Prong “A”

Respondent states that in order to satisfy Prong “A” of the ABC test, Affiliated must demonstrate that it did not exercise control over the services performed by its real estate referral agents and that it did not reserve the right to control their performance, adding that Affiliated need not have controlled every facet of the individuals’ services for them to be deemed employees under the UCL. Carpet Remnant Warehouse, 125 N.J. 567, 582 (1991). In this regard, respondent asserts that because the law under which real estate salespeople and brokers are licensed – N.J.S.A. 45:15-1 et seq. – expressly requires one who is licensed to perform real estate referral services to perform those services under the direct supervision of a broker, Affiliated cannot credibly assert that the real estate referral agents who performed services for Affiliated are free from direction or control by Affiliated. Furthermore, respondent maintains that Affiliated controls the payment structure of its referral agents. Specifically, Affiliated dictates to its referral agents the following payment structure: If the commission received by Affiliated from the selling or listing commission earned by the broker as a result of a referral is “under \$600,” the real estate referral agent receives 75 percent of Affiliated’s commission; If the commission received by Affiliated is “\$600 to less than \$3,000,” Affiliated retains a \$150 flat fee and the real estate referral agent receives the remainder of the commission paid by the broker to Affiliated; If the commission received by Affiliated is “over \$3,000,” the real estate referral agent receives 95 percent of Affiliated’s commission. Exhibit R-1, pages 356 through 357. Finally, respondent states that under the law that governs the licensure of real estate salespersons and brokers, real estate referral agents are only permitted to work for one broker at a time.<sup>1</sup>

Prong “B”

With regard to Prong “B” of the ABC test, which requires that in order to establish independent contractor status, one must prove that the service at issue is either outside the usual course of business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed, respondent notes that the Court in Carpet Remnant, *supra*, defined the phrase “all places of business” to mean those locations where the enterprise has a physical plant or conducts an integral part of its business. Relative to the latter part of that definition, respondent maintains that since the principal part of Affiliated’s business enterprise is providing real estate referral services pursuant to the referral agreements that Affiliated maintains with its real estate broker clients, the places where Affiliated’s real estate referral agents perform those services, including in their own homes, are locations where Affiliated conducts an “integral part of its business” and are, therefore, “an extension of Affiliated’s work location.” Similarly, respondent maintains that since the

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<sup>1</sup> N.J.S.A. 45:15-3 states the following in pertinent part: “A salesperson licensed with a real estate referral company shall not be employed or contracted by or licensed with more than one real estate broker or real estate referral company at any given time.”

principal part of Affiliated's business enterprise is providing real estate referral services, the performance of those services by the real estate referral agents engaged by Affiliated to satisfy Affiliated's obligations and responsibilities under its referral agreements with its real estate broker clients is a service performed within, not outside of, Affiliated's usual course of business.

Prong "C"

In support of its exceptions to the ALJ's conclusions regarding Prong "C" of the ABC test, respondent cites to the opinion in Gilchrist v. Division of Employment Sec., 48 N.J. Super. 147 (App. Div. 1957), wherein the court stated the following:

The double requirement [within Prong "C"] that an individual must be customarily engaged and independently established calls for an enterprise that exists and can continue to exist independently and apart from a particular service relationship. The enterprise must be one that is stable and lasting – one that will survive the termination of the relationship.

Thus, according to respondent, to satisfy Prong "C" of the ABC test, petitioner must demonstrate that each real estate referral agent was engaged in a viable, independently established business at the time that he or she rendered that service to petitioner. Relative to the facts adduced during the hearing, with an eye to addressing the above-cited standard, respondent observes the following:

[Peter] Humphrey...acknowledged that he has no knowledge or evidence that the referral agents have any indicia of an independently established business. He testified that he does not know if agents have a business listing, any kind of advertisement, or physical business location, nor was he able to provide evidence of it during the audit. Humphrey acknowledged that the referral agents must use his business address and cannot operate as a referral agent without listing Affiliated's business location on their licenses.

In reply to the exceptions filed by respondent, petitioner maintains the following with regard to Prong "A:"

[T]he agents for [Affiliated] take no direction from the Company at any time. The majority of our agents never earn a commission, they simply want to retain the license as active.

Relative to Prong "B," petitioner maintains the following:

[A]ll of our agents perform services outside the scope of services offered in the usual course of business. [Affiliated] is holding their real estate license in an active status. Many of our agents are retired and keep their license because they earned it and do not wish to relinquish it to the State.

Others have full time occupations outside of real estate and, again, simply want to retain the license they studied for and earned. The usual course of business for [Affiliated] is to gain and retain licenses in its license holding capacity. NONE of our agents act to serve this purpose.

As to Prong “C,” petitioner asserts the following:

Many of our agents are retired and keep their license because they earned it and do not wish to relinquish it to the State. Others have full time occupations outside of real estate and, again, simply want to retain the license they studied for and earned. They pay [Affiliated] for the service of license holding. What they do outside of [Affiliated] is unknown and not a requirement for [Affiliated] to hold their New Jersey Real Estate Salesperson’s license.

In addition, petitioner maintains that respondent misunderstands the nature of Affiliated’s business and the services provided to it by its real estate referral agents, as evidenced, according to petitioner, by the refusal of respondent’s witness – Cherie Mokracek, Auditor within the Department’s Division of Employer Accounts – to acknowledge that the New Jersey Real Estate Commission license for Joseph Sciarrino on page 358 of Exhibit R-1 lists his license type as “Salesperson (Referral),” and not “Referral Agent.”

### **CONCLUSION**

Upon *de novo* review of the record, and after consideration of the ALJ’s initial decision, as well as the exceptions filed by respondent and reply to exceptions filed by petitioner, I hereby accept, for reasons entirely separate from and unrelated to those set forth by the ALJ in her initial decision, the ALJ’s recommended order reversing the Department’s assessment against Affiliated for unpaid contributions to the unemployment compensation fund and the State disability benefits fund. That is, I categorically reject the ALJ’s conclusion that Affiliated has satisfied the UCL’s test for independent contractor status – the ABC test - relative to the services performed for Affiliated by real estate referral agents during the audit period and I categorically reject the ALJ’s legal analysis in support of that conclusion, including her interpretation of relevant case law. However, I also do not agree with respondent’s assertion with regard to the exemption from UCL coverage at N.J.S.A. 43:21-19(i)(7)(K) for “[s]ervices performed by real estate salesmen or brokers who are compensated wholly on a commission basis,” that because the exemption applies to services performed by real estate salesmen or brokers, and does not expressly list services provided by real estate referral agents, Affiliated cannot successfully assert the exemption with regard to the individuals engaged by it to perform real estate referral services during the audit period.

The exemption from UCL coverage at N.J.S.A. 43:21-19(i)(7)(K) applies to “services performed by real estate salesmen or brokers who are compensated wholly on a commission basis.” Pursuant to N.J.S.A. 45:15-1 et seq., the New Jersey Real Estate

Commission licenses individuals as real estate brokers, real estate salespersons and real estate broker-salespersons. N.J.S.A. 45:15-3 expressly states that “the definition of real estate salesperson shall include a salesperson licensed with a real estate referral company,” adding in pertinent part that “[a] real estate salesperson licensed with a real estate referral company...is defined to be any natural person employed or contracted by and operating under the supervision of a licensed real estate broker through a real estate referral company whose real estate brokerage-related activities are limited to referring prospects for the sale, purchase, exchange, leasing or rental of real estate or an interest therein.” (emphasis added). Thus, under N.J.S.A. 45:15-1 et seq., an individual who is licensed by the New Jersey Real Estate Commission to work for a real estate broker operating a real estate referral company, which individual performs brokerage-related activities that are limited to referring prospects for the sale of real estate is, in fact, a real estate salesperson. Indeed, as noted by petitioner in his reply to respondent’s exceptions, the record includes copies of licenses issued by the New Jersey Real Estate Commission to individuals engaged by Affiliated during the audit period for the performance of real estate referral services and those licenses list the license type as either “Salesperson (Referral),” “Salesperson,” or “Broker/Salesperson.” Exhibit R-1, pp. 358 through 517.<sup>2</sup> Thus, as each of the real estate referral agents engaged by Affiliated during the audit period was licensed by the New Jersey Real Estate Commission as either a real estate salesperson or a real estate broker/salesperson, the services performed by those individuals - referring prospects for the sale, purchase, exchange, leasing or rental of real estate – were, in fact, “services performed by real estate salesmen or brokers.” Furthermore, under the pay structure for Affiliated’s real estate referral agents described in detail above each was compensated “wholly on a commission basis.”

Finally, regarding the requirement at N.J.S.A. 43:21-19(i)(7) that in order to successfully assert any of the separate specialized exemptions set forth at N.J.S.A. 43:21-19(i)(7), including the exemption at N.J.S.A. 43:21-19(i)(7)(K), a putative employer must establish not only that the services are covered under the terms of the particular UCL exemption (in this instance, that the services were performed by real estate salesmen or brokers who are compensated wholly on a commission basis), but also that those services are exempt under FUTA; in this particular instance, with regard to these particular services, 26 U.S.C. §3508 contains an express exemption from FUTA coverage. That is, 26 U.S.C. §3508 of FUTA contains an express exemption for services performed as “a qualified real estate agent.” 26 U.S.C. §3508 defines the term “qualified real estate agent” to mean “any individual who is a salesperson if, (a) such individual is a licensed

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<sup>2</sup> There are several licenses within Exhibit R-1 that list the license type for a particular individual as “Referral Agent,” such as for Karen Kirby, Catherine Burke, John Bradshaw and Franca Gosselin. However, later in Exhibit R-1, where there are screens printed from what appears to be an on-line database (from the website of the Department of Banking and Insurance) of individuals who are in possession of licenses issued by the New Jersey Real Estate Commission, it lists the license type for at least one of those same individuals – Karen Kirby – as “Salesperson (Referral).” Thus, it would appear that for licensure purposes, the terms “Salesperson (Referral)” and “Referral Agent,” are synonymous.



real estate agent, (b) substantially all of the remuneration (whether or not paid in cash) for the services is performed by such individual as a real estate agent is directly related to sales or other output (including the performance of services) rather than to the number of hours worked, and (c) the services performed by the individual are performed pursuant to a written contract between such individual and the person for whom the services are performed and such contract provides that the individual will not be treated as an employee with respect to such services for Federal tax purposes.” Each of the real estate referral agents who performed services for Affiliated during the audit period was licensed by the New Jersey Real Estate Commission as either a real estate salesperson or a real estate salesperson/broker; the remuneration for the services performed by each such real estate referral agent was directly related to sales or other output (including the performance of services) rather than to the number of hours worked; and each such real estate referral agent performed services for Affiliated pursuant to a “referral agent agreement,” which stated, “[t]hose licensed as referral agents under [Affiliated] are employed only as independent contractors and are responsible for payment of their own State and Federal income and FICA taxes.” Exhibit R-1, pp. 350 and 351. The latter statement is not accurate as it relates to Affiliated’s characterization of the services of the real estate referral agents as “independent contractors,” since Affiliated’s real estate referral agents were not independent contractors, but rather, under both State and Federal law were in exempt employment.<sup>3</sup> Nevertheless, the statement within the “referral agent agreement” would appear to meet the third criteria for the relevant FUTA exemption in that the agreement does state that the real estate referral agents engaged by Affiliated will not be treated as employees for Federal tax purposes.

For the foregoing reasons, I find that the services performed by real estate referral agents for Affiliated during the audit period are exempt from UCL coverage under N.J.S.A. 43:21-19(i)(7)(K).

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<sup>3</sup> A common misconception is that when services performed by a particular type of worker are classified as exempt employment under either State law (e.g., N.J.S.A. 43:21-19(i)(7)(K)) or Federal law (e.g., 26 U.S.C. §3508) this equates to independent contractor status. It does not. In order to establish independent contractor status under the UCL, a putative employer must prove to the satisfaction of the Department with regard to the services at issue and the individual providing those services that all three prongs of the UCL’s ABC test have been met. In order to establish independent contractor status under FUTA, a putative employer must prove to the satisfaction of the IRS that the services and the individual providing those services meet the IRS’ test for independence. Classification of a type of services as exempt employment, simply means that the employer is relieved from employment tax liability with regard to payment for the services at issue.

**ORDER**

Therefore, it is hereby ordered that the Department's assessment against Affiliated for unpaid contributions to the unemployment compensation fund and State disability benefits fund for the audit period 2015 through 2019 is reversed.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY  
THE COMMISSIONER, DEPARTMENT  
OF LABOR AND WORKFORCE DEVELOPMENT



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