

# Unlicensed Real Estate Assistants

With the recent increase in the sales of real property, many REALTORS® are utilizing the services of personal assistants and/or unlicensed individual (For purposes of simplicity, the term “Personal Assistant” will be used throughout this article to describe an unlicensed individual). The use of unlicensed individuals in real estate businesses is not a new idea, rather, it is an idea that is more widespread now than ever before. Unlicensed individuals are being utilized to assist with routine tasks associated with the business. It can easily be seen that with the dramatic increase in property sales over the past few years, the need for additional manpower to assist with day-to-day activities has led to an increase in the number of personal assistants in the real estate profession.

There are numerous issues to consider prior to retaining the services of a personal assistant. One must be aware of the fact that if the personal assistant is unlicensed, they cannot perform any licensed activity pursuant to New York State Real Property Law, Article 12-A. One must also be aware that a personal assistant may be considered an employee rather than an independent contractor. The following should assist you in determining whether a personal assistant is right for you.

## What May A Personal Assistant Legally Do?

A personal assistant is unlicensed, therefore, they cannot perform any function set forth in New York State Real Property Law, Article 12A, §440. As a general rule, any office function that is not set forth in §440 can be performed by a personal assistant. Some of these general office activities that may be performed by an employee, secretary or a personal assistant who does not hold a real estate license are:

- Answer the phone, forward calls, and take messages.
- Arrange appointments by telephone for the licensee.
- Follow up on loan commitments after a contract has been negotiated and generally secure status reports on the loan progress.
- Assemble documents for closing.
- Write ads for approval of broker and place approved classified advertising.
- Type contract forms for approval of broker.
- Submit approved listings and changes to Multiple Listing Service (MLS).
- Compute commission checks.
- Place or remove signs from property.
- Order items of repair as directed by the broker.
- Secure public documents from county clerks, courts, water and/or sewer departments or any document from another public repository.
- Prepare flyers and promotional information for approval by broker.
- Schedule appointments for licensees to show listed property.
- Gather information for a comparative market analysis.
- Gather information for an appraisal.
- Monitor licenses and personnel files.
- Perform secretarial and clerical duties such as typing of letters and filing.

## What Are Personal Assistants NOT Allowed To Do?

The items listed below are those considered to be a licensed activity pursuant to Section 440 of Article 12A of the New York State Real Property Law:

- Host open houses.

- Show property.
- Explain or interpret information on listings, contracts or other information relating to a transaction.
- Negotiate or agree to a commission or commission split with any individual.
- Making phone calls, telemarketing or performing other activities to solicit business on behalf of the broker.
- Any other activity not set forth above for which a license is required.

#### Who Is Responsible for the Personal Assistant?

The licensed broker is explicitly responsible for the supervision and control of activities conducted in the name of the licensed real estate business. The broker is required to extend and provide necessary training, supervision and control over licensed and non-licensed services being provided to consumers on behalf of the licensed brokerage business, including any work performed on behalf of the brokerage or on behalf of its associate brokers or salespeople by unlicensed assistants. If a personal assistant is performing licensed activities, the broker and licensee are responsible. Therefore, the licensee is jeopardizing his/her license by allowing a personal assistant to perform licensed activities.

#### How Should a Personal Assistant be Paid?

Personal assistants may be paid directly by either the licensed broker or salesperson. Since most real estate salespersons are treated as independent contractors, it is understandable that one would assume personal assistants can be classified as the same. However, as is set forth below, by its very nature, a personal assistant is most likely an employee rather than an independent contractor. Therefore, the method of reimbursement for unlicensed activities is best handled on an hourly, per activity, or salaried basis.

Since the personal assistant is not a licensee, the "safe harbor" provision of section 3508 of the Internal Revenue code addressing independent contractor status of real estate agents is not applicable. We must then look at the traditional test for an independent contractor. The key element to consider is the amount of control the licensee has over the personal assistant. One could easily infer from the title, "personal assistant" that the licensee has full control over the personal assistants activities. If the licensee retains the services of a personal assistant to relieve them of some of their responsibilities and duties, it is inherently obvious that the licensee will need to retain direction and control as to the hours and work to be done. These factors would indicate an employee relationship. The licensee would then be obligated to withhold taxes, both federal and state, as well as FICA, unemployment and workers compensation. Failure to withhold and pay such items may result in claims for back taxes against the licensee or the broker.

If compensated on a completed-transaction basis, the assistant must be licensed as a real estate salesperson and must receive compensation directly from the licensed broker. In other words, you cannot pay a personal assistant any pro-rated portion of an earned commission. Furthermore, you cannot make payment to the personal assistant contingent upon the successful closing of a property. If a personal assistant performs an unlicensed activity, they are entitled to the agreed upon compensation whether the transaction closes or not.

It is important to note that personal assistants, due to assignments given and the supervision control exercised by the broker or salesperson hiring the individual, would undoubtedly not be considered independent contractors. It is more likely, that they would be considered employees and as such, would be entitled to all the rights and benefits set forth by Federal and New York State Law.