

2021 MONTHLY
LEGAL UPDATE
FREE

By Anthony Gatto, Esq.



New York State Association of REALTORS®, Inc.

Welcome!!!

- 1 credit of CE under “legal updates” for registrants
- Monthly updates will be the same unless something new arises

Welcome!!!

- Members may take for CE credit once every license renewal cycle
- Update will be recorded and livestreamed for those not seeking CE
- Information will be disseminated through other courses as well

Future Dates

~~April 14~~

June 28

August 16

October 20

December 14

May 4

July 26

September 13

November 18

Register

- You must be logged in to NYSAR .com to register
- Under “Education” choose “NYSAR Course Schedule”
- Classes are on the calendar
- Choose “Education” and “NYSAR Legal Update CE Course” for more information

IS NY STILL UNDER A STATE OF EMERGENCY?

When Will the State of Emergency Expire?

- The current State of Emergency (SoE) is extended until April 25, 2021
- SoE needed to keep restrictions in place
- Without SoE everything will be as it was before March 2020

When Will the State of Emergency Expire?

- Extensions highly likely to continue as COVID-19 is still a public health risk
- Vaccination roll out and population vaccinated will have greatest impact on extensions

When Will the State of Emergency Expire?

- NYSAR is unaware of any possible modifications under Phase 2 due to any new gathering guidelines.

When Will the State of Emergency Expire?

- Legislation curbing the Governor's powers under a State of Emergency do not impact current Executive Orders

When Will the State of Emergency Expire?

All guidance
under Phase 2
still in effect

When Will the State of Emergency Expire?

There has been
no “relaxation”
of the guidance

When Will the State of Emergency Expire?

- NO COLD CALLS
- The law is not industry specific and is triggered statutorily by the SoE
- Only when the SoE is lifted will cold calling be permitted

General Business Law §399-z(5-a)

“It shall be unlawful for any telemarketer doing business in this state to knowingly make an unsolicited telemarketing sales call to any person in a county, city, town or village under a declared state of emergency or disaster emergency as described in sections twenty-four or twenty-eight of the executive law.”

General Business Law §399-z(1)

- h. “Telemarketer” means any person who, for financial profit or commercial purposes in connection with telemarketing, makes telemarketing sales calls to a customer when the customer is in this state or any person who directly controls or supervises the conduct of a telemarketer. For the purposes of this section, “commercial purposes” shall mean the **sale or offer for sale of goods or services;**
- j. “Telemarketing sales call” means a **telephone call made by a telemarketer** or by any outbound telephone calling technology that delivers a prerecorded message **to a customer or to a customer's voicemail or answering machine service for the purpose of inducing payment or the exchange of any other consideration for any goods or services;**

What about door to door marketing?

- It is NYSAR opinion that unsolicited door to door activity is contrary to the Phase 2 guidance
- There are no provisions in the Phase 2 guidance permitting such activity
- This includes “flyers” and hang tags

Travel Guidelines

Asymptomatic travelers entering New York from another country, U.S. state, or territory **are no longer required** to test or quarantine as of April 10, 2021. Quarantine, consistent with the CDC recommendations, is **still recommended** for all travelers who are not fully vaccinated or have not recovered from laboratory confirmed COVID-19 during the previous 3 months. Symptomatic travelers must immediately self-isolate and contact the local health department or their healthcare providers to determine if they should seek COVID-19 testing.

CDC

Requirement for Proof of Negative COVID-19 Test or Recovery from COVID-19 for All Air Passengers Arriving in the United States

State of Emergency & NYSAR

- Legal Hotline calls have more than doubled
- NYSAR in regular contact with various NYS agencies

State of Emergency & NYSAR

- Members utilize NYSAR COVID resources (videos, articles, FAQ's)
- NYSAR provided forms distributed to local boards and brokers:
 - COVID-19 Disclosure Form
 - Health and Travel Screening Questionnaire

State of Emergency & NYSAR

- Thank you to NYSAR members that followed and continue to follow the guidance from ESD and DOH
- Due to your diligence, NYSAR has been able to show our members are responsible

State of Emergency & NYSAR

- NYSAR has advocated that in the event of another shutdown (pre-phase 2 or red zone) that in-person real estate activity continue with PPE
- NYSAR is unaware of any COVID related exposures in real estate using PPE

State of Emergency & NYSAR

For up to date information on real estate matters related to COVID-19, please go to:

<https://nysarcovidupdates.com/>

Legal Hotline

- **Monday – Friday**
- **9:00am – 4:00pm**
- **518-436-9727**
- **518-43-NYSAR**

NYSAR V. DOS

TPA Guidance

- February 2020-DOS publishes TPA guidance
- #5 prohibits a landlord's agent from collecting a commission from a seller
- NYSAR and others sue DOS
- DOS enjoined from enforcing #5

TPA Guidance

- April 9, 2020
- Supreme Court, Albany County issues decision
- TPA does not include commissions as a prohibited fee
- Landlord's agent may continue to collect commissions from tenants.

TPA Guidance

- This issue may not be over
- There may be an appeal or legislation
- NYSAR will continue to monitor this matter and advise members of any developments

FAIR HOUSING: LAWFUL SOURCE OF INCOME

Lawful Source of Income

- Effective April 12, 2019
- Protected class in NY
- “Lawful source of income”
- Executive Law §292 and §296

What is Lawful Source of Income

- "lawful source of income" shall include, but not be limited to
 - child support
 - Alimony
 - foster care subsidies
 - income derived from social security
 - any form of federal, state, or local public assistance
 - housing assistance including, but not limited to, section 8 vouchers
 - any other form of housing assistance payment or credit whether or not such income or credit is paid or attributed directly to a landlord, and any other forms of lawful income.

What is Lawful Source of Income

- The provisions of this subdivision shall not be construed to prohibit the use of criteria or qualifications of eligibility for the sale, rental, leasing or occupancy of **publicly-assisted housing accommodations** where such criteria or qualifications are required to comply with federal or state law, or are necessary to obtain the benefits of a federal or state program. A publicly assisted housing accommodation may include eligibility criteria in statements, advertisements, publications or applications, and may make inquiry or request information to the extent necessary to determine eligibility.

Exemptions from the Law

- If a licensee is involved, there are no exemptions or carve outs for:
 - Owner-occupants
 - Dwellings with 1 or 2 units
 - Commercial property
 - Vacant land
 - Anything else a landlord may try to justify

Criteria or Qualifications

- Only permitted for publicly assisted housing as defined in Executive Law §296(11)
- Usually used to qualify individual for public housing

Criteria or Qualifications

- Landlords may not require credit checks for tenants receiving housing assistance through programs
- Programs screen individuals in order to qualify for the program
- Program determines how much individual can afford

Criteria or Qualifications

- There are no justifications for requiring a credit score from an individual with a housing assistance program
- The following are not justifications:
 - How do I know they can afford a percentage of the rent
 - I need credit score to see if they can pay utilities etc.
 - I need to know if the program drops them if they can afford the rent

Criteria or Qualifications

- No longer permitted to advertise anything that expresses, directly or indirectly, any limitation, specification or discrimination as to lawful source of income such as:
 - No Section 8
 - No Programs

That's what my client wants

If a landlord tells you not to present any applications from tenants receiving section 8 or any other type of housing assistance, you would need to advise the owner you are unable to follow their directive as it is unlawful. If they refuse to comply you must withdraw from the agreement

That's what my client wants

Any licensee receiving a directive from the owner, landlord, property manager, rental agent or other licensee to discriminate against individuals because of their lawful source of income should advise the individual that such actions are unlawful and you are unable to follow their directive. If they refuse to comply you must withdraw from the agreement

That's what my client wants

- If you know the landlord will accept an application from a section 8 tenant but will never approve the application, the licensee should terminate their involvement with the discriminating individual or entity.
- Document the discriminatory actions of the individual or entity and your termination of any relationship in the event any action is taken by the person(s) being discriminated against.

What we do know

It is not unlawful to ask about income, only to discriminate based on lawful sources of income. Housing providers may ask about income, and about the source of income, and require documentation, in order to determine a person's ability to pay for the housing accommodation, but must accept all lawful sources of income equally

Security Deposits

- Landlord must accept a voucher from a program in lieu of a security deposit
- Any landlord or licensee acting on behalf of a landlord that refuses to accept a voucher would be acting in a discriminatory manner

Inspections

- Landlords must permit programs to inspect the property
- Landlords may not claim the property is not inspected by the program and are unable to accept individuals

Repairs

- Landlord is prohibited from refusing to make repairs identified in program inspection
- “Financial hardship” defense may not be successful

COMPLYING WITH ADVERTISING ON SOCIAL MEDIA PLATFORMS WITH LIMITED CHARACTERS

Advertising on Social Media

- Make every attempt to comply on social media site
- If there is room to comply you should
- Alternatives are only permitted if “traditional” compliance is impossible

Advertising on Social Media

- Requirements for Social Media sites are the same as web based advertisements

Advertising on Social Media

- John Smith, a licensed real estate salesperson, uses a mobile app to advertise an exclusive listing. The app limits how many characters may be sent in each advertisement
 - Mr. Smith could have complied with the regulation by “threading” his advertisements and necessary disclosures to make clear that multiple successive messages that exceed the character limitations actually act as one advertisement.

Advertising on Social Media

- John Smith, a licensed real estate salesperson, uses a mobile app to advertise an exclusive listing. The app limits how many characters may be sent in each advertisement
 - As an alternative, the Department would permit Mr. Smith to provide a clear, conspicuous and unambiguous link within the same advertisement to a separate page where all the required disclosures are made. For a link to be acceptable, it must clearly and conspicuously disclose the link's purpose and cannot simply state “click here for more information”.

Methods of Compliance

- Try to comply with all advertising requirements and disclosures on your SM homepage
- If you can comply you should
- If it is impossible to comply, the following options are available:
 - Pinning
 - Threading
 - Clear, conspicuous and unambiguous link to the required disclosures
 - clearly and conspicuously disclose the link's purpose
 - cannot simply state “click here for more information”

FAIR HOUSING PERSONAL LETTERS FROM BUYERS

The Letter

- Listing Agent receives purchase offer
- Purchase offer contains personal letter from buyer(s)
- What should Listing Agent do?

Where did the Letter Originate?

- Licensees should NEVER EVER suggest use of a letter that identifies protected class
- Subjecting seller and listing brokers to potential fair housing violation

We Would Love to Live...

- Usually, letters are an emotional plea
- Often directly or indirectly mentions protected classes
 - “I can see our family celebrating...here”
 - “My wife and I would love to raise our family”
 - “Our family pictures will line the staircase just like your family”
 - “Our daughter loves to swim”
 - “Our mother can walk to” specific house of worship
 - “We want to send our children to the Elementary School”

Prevention

- If letter is a contributing factor to acceptance/denial it is discriminatory
- Buyer's Agent/Seller's Agent
 - Discuss potential fair housing violation
 - Do not read or accept letter drafted by buyer
- Listing agent
 - Discuss liability at listing interview and do not deliver letter to seller
 - Strongly advise against accepting letter from buyers

The Buyer Wants the Letter...

- Listing agent and/or buyer's agent should not be involved in the delivery of letter
- Listing agent/buyer's agent should not have any knowledge as to the contents of the letter
- If buyer wants letter make them deliver it

The Buyer Wants the Letter...

- Recommend that seller have their attorney review the letter
- Have a paper trail showing your good faith effort at advising against practice
- Seller can instruct licensee not to accept any offers with personal letters

Liability

- Non-prevailing purchaser is aggrieved party
- Find out why they lost out... **remember the grocery store**
- “The seller wanted the new family to have it”
- DING...DING...DING
- If a licensee is involved, they will be a named party if an action is filed
- Licensee will have to show they had no knowledge of letter or show good faith effort

The Painful Part

- If you know that the buyer has delivered a letter to the seller containing references to a protected class against your advice and you know the seller has made their determination as a result of the aforementioned letter, you should immediately withdraw from the transaction
- Document everything!!!
- Commissions at closing are not worth prosecution for fair housing
- DON'T BE THE TEST CASE