

2021 MONTHLY
LEGAL UPDATE
FREE

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New York State Association of REALTORS®, Inc.

Legal Hotline

Monday-Friday

9:00a.m.-4:00p.m.

518-436-9727

Future Dates

- NYSAR's free monthly Legal Update CE
- May take once every license renewal period for 1 credit under legal update category
- Recorded and livestreamed for non-credit

Future Dates

August 16

October 20

December 14

September 13

November 18

2022 dates in the process of being scheduled

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?

Are We Still Under a State of Emergency?

- Yes, but one unrelated to COVID-19
- The COVID-19 SoE was lifted

June 15 Press Release

From ny.gov:

Unvaccinated individuals continue to be responsible for wearing masks, in accordance with federal CDC guidance. Consistent with the State's implementation of the recent CDC guidance, masks are still required for unvaccinated individuals. Further, the State's health guidelines continue to be in effect for large-scale indoor event venues, pre-K to grade 12 schools, public transit, homeless shelters, correctional facilities, nursing homes, and health care settings per CDC guidelines.

When Will the State of Emergency Expire?

- NYSAR is unaware of any possible modifications from the May 19th implementation of the CDC guidelines for vaccinated/unvaccinated individuals.
- NYSAR will provide additional information as it is made available

What Qualifies as “Vaccinated”

- Vaccinated-Individual received 2nd dose of Pfizer/Moderna or single J&J and is more than 14 days since.
- Unvaccinated-no vaccination, refuses to answer if they are vaccinated or less than 14 days since vaccine as outlined above

Phase 2

**PHASE 2 IS NO
LONGER IN EFFECT**

COVID Forms

- COVID-19 Disclosure Form and Health Screening Questionnaire are no longer necessary
- Brokers may choose to continue the use of the forms at direction of the client or for unvaccinated individuals

NYS/CDC Guidance

- Offices < 250 persons “congregating” that wish to comply:
 - Follow full CDC guidelines vaccinated persons do not have to wear a mask unvaccinated persons must wear a mask and maintain 6 ft of social distancing
 - May ask for proof of vaccination, paper, digital or verbally (honor system)
 - May comply in designated areas

NYS/CDC Guidance

- Offices with <250 persons “congregating” that choose not to comply:
 - Do not follow CDC guidance
 - Everyone must wear a mask and maintain 6 ft of social distancing whether vaccinated or unvaccinated

NYS/CDC Guidance

- Owners, Landlords, Property Managers etc. may also require individuals to wear masks or other PPE
- If licensee is asked by client/customer to verify vaccination status of individual entering property, licensee must comply
- Client/customer may require proof of vaccination as well

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-Executive Order 211

- Related to gun violence
- NOW, THEREFORE, I, ANDREW M. CUOMO...do hereby declare a State-wide disaster emergency effective July 6, 2021, and until further notice across New York State;

Cold Calls

- 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**;

FAIR HOUSING: WHAT CAN YOU DO NOW?

Office Policies

- Create strong anti-discrimination office policy
- Address what is expected
- How to treat seller/purchaser
- What resources are available
 - NAR/NYSAR
 - HUD
 - NYS DHR/DOS

Office Policies

- Sellers
 - Pre-approval of potential purchasers must be universal (up to seller whether to require pre-approval)
 - Discuss Fair Housing issues at interview
 - Acceptance of personal letters, discuss with Seller
 - Scrutinize listing information provided

Office Policies

- Purchasers
 - Pre-approval of potential purchasers before showing any properties must be universal*
 - Writing and delivery of personal letters
 - Standard search procedures for properties

Office Policies

- Purchasers
 - Do not discuss:
 - Demographics
 - Crime
 - Quality of schools
 - Neighborhoods
 - Places of worship

Training/Education

- Brokers may provide voluntary training
 - On-site or off-site
 - Broker is being proactive
 - Utilize existing resources, don't reinvent the wheel
 - NYSAR is a great resource with new information added on a regular basis

What Can NYSAR Do For You?

- NYSAR.com Fair Housing page
 - Overview
 - Articles
 - Videos
 - Link to government resources
- NYS DHR Fair Housing page
- NAR Fair Housing page
- HUD Fair Housing page

What Can NYSAR Do For You?

- NYS DHR Fair Housing page*
- NAR Fair Housing page
- HUD Fair Housing page

MULTIPLE OFFERS

Multiple Offers

- No law, rule or regulation controls multiple offers
- **Brokers actions controlled by clients wishes**
 - Discuss MO with seller at time of listing
 - Seller can determine ahead of time or when it arises
 - Seller has options as to how they want to proceed
 - Seller must be informed when MO arises
- Seller **does not** have to treat all buyers equally (non-discriminatory)
- Broker **does not** dictate how to treat MO's

Types of Multiple Offers

- Highest and best (all or some)
 - Seller is permitted to share details of other offers
 - Seller does not have to accept highest and best
 - Seller can do this multiple times
 - Seller **does not** have to treat all buyers equally (non-discriminatory)

Types of Multiple Offers

- Counter offer (all or some)
 - Be careful, make it contingent on seller acceptance
 - Seller can send out multiple counters if following above
 - It is not recommended that seller send out multiple counters and tell buyers “first in time wins”
 - Seller ***does not*** have to treat all buyers equally (non-discriminatory)

Types of Multiple Offers

- Accept any offer submitted and not enter MO
 - Seller is not required to take the best offer
 - Seller can go back to one or more offers with any lawful demand
 - Seller **does not** have to treat all buyers equally (non-discriminatory)

Questions to Ask Yourself

- Ask yourself two questions:
 1. What does the seller want to do if there are multiple offers?
 2. What type of multiple offer scenario does the seller want to initiate, if any?

Escalation Clauses and Multiple Offers

- What if multiple offers contain escalation clauses?
 - Each offer would trigger the escalation clause of another offer
 - Continue through the process of elimination
 - Seller is not required to take highest offer
 - Only the seller may determine “no escalation clauses”

Multiple Offers

- Make sure you discuss all possible pros and cons with each multiple offer counter
- The seller does not have to offer the counter to all potential purchasers, may pick and choose so long as not being done for a discriminatory purpose
- Licensee should document multiple offer discussions and final decision made by seller

MANDATORY CE REQUIREMENT EFFECTIVE 7/1/2021

Continuing Education

- Currently, non-exempt licensees must complete 22 ½ hours of CE every 2 years
- Included in the 22 ½ hours are 3 hours of Fair Housing and 1 hour of Agency (unless 1st renewal, then 2 hours of Agency)
- Brokers licensed for 15 consecutive years prior to 7/1/2008 are currently exempt from CE

Continuing Education

- During the Fall 2018 NYSAR business meetings, multiple committees approved proposed legislation to increase the “core” requirements of CE
- The same committees also supported the elimination of the grandfathering clause
- It was NYSAR’s opinion that every licensee needs to take CE and no other licensed profession has a grandfathering exemption

Continuing Education

- NYSAR drafted proposed amendments to the Real Property Law
- Proposed amendments were introduced before the legislature
- Passed Assembly on 5/30/19, passed Senate on 6/20/19
- Delivered to Governor on 10/11/2019

Continuing Education

- Governor Cuomo signed into law on 10/23 to:
 - Include 2.5 hours of ethical business practices
 - Include 1 hour of legal updates
 - This is part of the total 22.5 hours required
 - Fair Housing and Agency are still required
 - Eliminate the “grandfathering exemption” for all licensees

Continuing Education Removed Text

~~The provisions of this paragraph shall not apply to any licensed real estate broker who is engaged full time in the real estate business and who has been licensed under this article prior to July first, two thousand eight for at least fifteen consecutive years immediately preceding such renewal.~~

Continuing Education RPL 441(3)(a)

3 hours of instruction pertaining to fair housing and/or discrimination in the sale or rental of real property or an interest in real property, at least 2 ½ hours of instruction pertaining to ethical business practices, at least 1 hour of instruction pertaining to recent legal matters governing the practice of real estate brokers and salespersons in New York which may include statutes, laws, regulations, rules, codes, department of state opinions and decisions, and court decisions and at least 1 hour of instruction pertaining to the law of agency except in the case of the initial 2-year licensing term for real estate salespersons, 2 hours of agency related instruction must be completed

Continuing Education

- Changes would not go into effect until 7/1/2021
- Every single licensee currently grandfathered would be required to complete 22.5 hours of CE
- No exemptions means no exceptions (except for attorneys)
- NYSAR and local Realtor boards/associations will most likely offer the 2 ½ hours of ethical business practices that will also satisfy the NAR requirement

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

Liability-Agency Issues

- Dual/Designated Agency
 - Licensee puts seller at risk
 - Seller is client of licensee's broker
 - Not act to the detriment of either party
- Seller or Broker's Agency
 - Licensee must act in best interest of seller
 - Submitting letter on behalf of buyer may breach fid duty

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

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: LAWFUL SOURCE OF INCOME

Lawful Source of Income

- Recent NYC investigation
- Sent out testers
- Found high percentage of licensees violated law

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