

2021 MONTHLY  
**LEGAL UPDATE**  
**FREE**

**SEPTEMBER 2021**

By Anthony Gatto, Esq.



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

October 20  
December 14

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

# WHAT IS THE HERO ACT?

## The HERO Act

- Signed into law on May 5, 2021
- Effective September 5, 2021
- Implemented September 6, 2021
- Currently expires September 30, 2021
- Will be renewed based on infection rates
- <https://covid19tracker.health.ny.gov/>

## The HERO Act

- New York Health and Essential Rights Act (NY HERO Act)
- Mandates extensive new workplace health and safety protections
- Sets forth mandatory standards not just for COVID-19, but for all airborne infectious diseases.

## The HERO Act

- HERO Act is triggered by NYSDOH designation
- “highly contagious communicable disease that presents a serious risk of harm to the public health”

## The HERO Act

- requires all employers in New York to implement certain safety standards and adopt a prevention plan to protect against the spread of airborne infectious diseases in the workplace.
- Employer must “promptly” take certain steps to activate their plans and ensure compliance.

# The HERO Act

- According to the Airborne Infectious Disease Exposure Prevention Standard, once such as designation is made, each employer must:
  - Immediately review the worksite's exposure prevention plan and update the plan, if necessary, to ensure that it incorporates current information, guidance, and mandatory requirements;
  - Finalize and promptly activate the worksite exposure prevention plan;
  - Provide a verbal review of the plan; and
  - Provide each employee with a copy of the exposure prevention plan, post a copy of the plan in a visible and prominent location at each worksite, and ensure that a copy is accessible to employees during all shifts.

# The HERO Act

- While the designation remains in effect, each employer shall ensure that the plan is followed by:
  - Assigning enforcement responsibilities to one or more supervisory employees;
  - Monitoring and maintaining exposure controls; and
  - Regularly checking for updated information from the New York State Department of Health and CDC, and updating the plan as necessary.

# The HERO Act

- Applicable to employees and independent contractors at a “work site”
- Labor Law 218-B(b)
  - “work site” shall mean any physical space, including a vehicle, that has been designated as the location where work is performed.

# The HERO Act

- What is a “work site” for real estate
  - Brokers office
  - Any property where a showing or open house is taking place
    - Although the owner is not responsible for compliance, the broker is responsible for licensee compliance at the showing/open house

# The HERO Act-Minimum Controls

General Awareness: Individuals may not be aware that they have the infectious disease and can spread it to others. Employees should remember to:

- Maintain physical distancing;
- Exercise coughing/sneezing etiquette;
- Wear face coverings, gloves, and personal protective equipment (PPE), as appropriate;
- Individuals limit what they touch;
- Stop social etiquette behaviors such as hugging and hand shaking, and
- Wash hands properly and often.

## The HERO Act

- “Stay at Home Policy”: If an employee develops symptoms of the infectious disease, the employee should not be in the workplace. The employee should inform the designated contact and follow New York State Department of Health (NYSDOH) and Centers for Disease Control and Prevention (CDC) guidance regarding obtaining medical care and isolating.

# The HERO Act

- Health Screening: Employees will be screened for symptoms of the infectious disease at the beginning of their shift. Employees are to self-monitor throughout their shift and report any new or emerging signs or symptoms of the infectious disease to the designated contact. An employee showing signs or symptoms of the infectious disease should be removed from the workplace and should contact a healthcare professional for instructions.
  - The health screening elements will follow guidance from NYSDOH and CDC guidance, if available.

# The HERO Act

- **Face Coverings:** To protect your coworkers, employees will wear face coverings throughout the workday to the greatest extent possible. Face coverings and physical distancing should be used together whenever possible. The face covering must cover the nose and mouth, and fit snugly, but comfortably, against the face. The face covering itself must not create a hazard, e.g. have features could get caught in machinery or cause severe fogging of eyewear. The face coverings must be kept clean and sanitary and changed when soiled, contaminated, or damaged.

## The HERO Act

- **Physical Distancing:** Physical distancing will be followed as much as feasible. Avoid unnecessary gatherings and maintain a distance of at least six feet (or as recommended by the NYSDOH/CDC for the infectious agent) from each other. Use a face covering when physical distance cannot be maintained.

## The HERO Act-Control Methods

In situations where prolonged close contact with other individuals is likely, use the following control methods:

- restricting or limiting customer or visitor entry;
- limiting occupancy;
- allowing only one person at a time inside small enclosed spaces with poor ventilation;
- reconfiguring workspaces;

# The HERO Act-Control Methods

In situations where prolonged close contact with other individuals is likely, use the following control methods:

- physical barriers;
- signage;
- floor markings;
- telecommuting;
- remote meetings;

# The HERO Act-Control Methods

In situations where prolonged close contact with other individuals is likely, use the following control methods:

- preventing gatherings;
- restricting travel;
- creating new work shifts and/or staggering work hours;
- adjusting break times and lunch periods;
- delivering services remotely

# The HERO Act-Control Methods

Hand Hygiene: To prevent the spread of infection, employees should wash hands with soap and water for at least 20 seconds or use a hand sanitizer with at least 60% alcohol to clean hands BEFORE and AFTER:

- Touching your eyes, nose, or mouth;
- Touching your mask;
- Entering and leaving a public place; and
- Touching an item or surface that may be frequently touched by other people, such as door handles, tables, gas pumps, shopping carts, or electronic cashier registers/screens.
- Because hand sanitizers are less effective on soiled hands, wash hands rather than using hand sanitizer when your hands are soiled.

# The HERO Act-Control Methods

- Cleaning and Disinfection
- “Respiratory Etiquette”: Because infectious diseases can be spread by droplets expelled from the mouth and nose, employees should exercise appropriate respiratory etiquette by covering nose and mouth when sneezing, coughing or yawning.
- Special Accommodations for Individuals with Added Risk Factors: Some employees, due to age, underlying health condition, or other factors, may be at increased risk of severe illness if infected. Please inform your supervisor or the HR department if you fall within this group and need an accommodation.

# The Hero Act

- The requirements of the HERO Act are almost identical to the requirements under the former Phase 2
- Licensees should take the same precautions at showings/open houses
- All individuals must wear a mask, maintain social distancing
- Stagger showing times to avoid unnecessary in person contact
- Set up appointment times for open houses to avoid “gathering”

# The HERO Act

- There may be changes depending on infection rates
- NYS has provided little clarification on the HERO Act requirements
- NYSAR will be providing additional information to members via “Flash Update” emails

# The HERO Act

- Information on HERO Act
  - <https://dol.ny.gov/ny-hero-act>
- Includes:
  - NY Hero Act Airborne Infectious Disease Exposure Prevention Standard
  - Model Airborne Infectious Disease Exposure Prevention Plan(Generic)
  - Industry Specific Templates for Model Airborne Infectious Disease Exposure Prevention Plan
  - Information and FAQs regarding the NY HERO Act

# 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 (HERO Act now)

## 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;
- Extended by Gov. Hochul

## 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 1<sup>st</sup> 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