

2021 MONTHLY
LEGAL UPDATE
FREE

DECEMBER 2021

By Anthony Gatto, Esq.



nysar

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

• **2022 Dates**

January 11

February 23

March 16

April 25

May 9

June 15

July 18

August 16

September 20

October 26

November 21

December 12

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

MASK MANDATE

NYS Mask Mandate

- Effective 12/13/2021
- Will be re-evaluated on 1/15/2022
- Statewide mandate regardless of local government enforcement

NYS Mask Mandate

- “masks will be required to be worn in all indoor public places unless businesses or venues implement a vaccine requirement”
- Indoor public place is defined as any indoor space that is not a private residence

NYS Mask Mandate

- “Private Residence” refers to an individual's residence where non-business activity occurs.
- Showings/Open Houses are business activities so the mandate would apply in those situations (same as under HERO Act)

NYS Mask Mandate

- Businesses have two options
 - Mandate proof of vaccination for all persons entering office
 - Require all persons in office to wear masks
- All brokerage offices are impacted
- All showings/open houses are impacted

Proof of Vaccination

- Must show proof (no honor system)
- Acceptable proof:
 - Excelsior Pass
 - Excelsior Pass Plus
 - SMART Health Cards issued outside of New York State
 - Full-course vaccination through NYC COVID Safe app
 - CDC Vaccination Card
 - Other official immunization record

Proof of Vaccination

- Proof can be paper, digital etc.
- Businesses can mandate the type of proof required

Mask Mandate

- Businesses that implement a mask requirement must ensure all patrons past their second birthday and medically able to tolerate a face covering wear a mask at all times while indoors.
- Individuals alone in an enclosed space (office with a door) may remove their masks

Showings/Open Houses

- Owner/Landlord can choose proof of vaccination or mask mandate
- Broker must comply with Owner/Landlord request otherwise breach of fiduciary duty
- Broker office policy does not extend to showing/open house
- Broker must not obey an unlawful directive from owner/landlord

Showings/Open Houses

- Owner/Landlord proof of vaccination:
 - Broker responsible for showing/open house needs to see proof of vaccination
 - Broker can rely on cooperating broker to comply for showing
 - Requirement should be disseminated in MLS or listing

Showings/Open Houses

- Owner/Landlord mask mandate:
 - Broker responsible for showing/open house needs to make sure all comply
 - Broker can rely on cooperating broker to comply for showing
 - Requirement should be disseminated in MLS or listing

Fully Vaccinated

- In accordance with CDC's definition, fully vaccinated is defined as 14 days past an individual's last vaccination dose in their initial vaccine series (14 days past the second shot of a two-dose Pfizer-BioNTech or Moderna vaccine; 14 days past the one-shot Janssen/Johnson & Johnson vaccine). The State also accepts WHO-approved vaccines for these purposes. Parents and guardians can retrieve and store an Excelsior Pass and/or Excelsior Pass Plus for children or minors under legal guardianship.

Proof of Vaccination

- Vaccines for children ages 5 – 11 have only been available since November 2021. Therefore, in order to enter a business or venue that implements a proof of vaccination requirement, children ages 5 – 11 only have to show proof of having had at least one dose of the COVID-19 vaccination.
- Vaccines have been available for 16–17-year-olds since April 2021 and for 12—15-year-olds since May 2021. At the time of the determination, 63% of the 12 – 17 age group has been fully vaccinated in New York State.

NYS HERO Act

- For purposes of complying with the NY HERO Act, the Commissioner's Determination constitutes Department of Health guidance related to face coverings, meaning employers must ensure their employees adhere to masking requirements or require proof of vaccination as a condition of entry into the business.

Liability

- Enforcement includes fine and DOS discipline
- Even if a local government declares they will not enforce mandate, licensee is still liable if reported to DOS for violating a State mandate.

IS NY STILL UNDER A STATE OF EMERGENCY?

Are We Still Under a State of Emergency?

- Yes, There are currently 2 SoE's in effect
- Gun violence
 - effective until further notice
- Health care
 - effective until 1/15/2022

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**;

NAR AMENDMENTS TO MLS POLICY

Amendments to NAR MLS Policies

- **Internet Data Exchange (IDX) Policy, Policy Statement 7.58**
- **Policies Applicable to Participants' IDX Websites and Displays**
- *12. An MLS Participant's IDX display must identify the listing firm, and the email or phone number provided by the listing participant in a reasonably prominent location and in a readily visible color and typeface not smaller than the median used in the display of listing data.*

Amendments to NAR MLS Policies

- **IV. Requirements that MLSs May Impose on the Operation of VOWs and Participants, Policy Statement 7.91.**
- *d. Any listing displayed on a VOW shall identify the name of the listing firm, and the email or phone number provided by the listing participant in a reasonably prominent location and in typeface not smaller than the median typeface used in the display of listing data.*
- Rationale: Listing broker attribution with contact information could provide a more accurate representation to the public about the listing and improve the public's ability to seek additional property details. If this motion is adopted, then accompanying changes will be made to the NAR Model MLS Rules and Regulations.

Amendments to NAR MLS Policies

- **New MLS Policy Statement 8.8 – Requiring Disclosure of Buyer Agent Compensation:**
- *MLSs must include the listing broker's offer of compensation for each active listing displayed on its consumer-facing website(s) and in MLS data feeds provided to participants and subscribers and must permit MLS participants or subscribers to share such information through IDX and VOW displays or through any other form or format provided to clients and consumers. The information about the offer of compensation must be accompanied by a disclaimer stating that the offer is made only to participants of the MLS where the listing is filed.*
- Rationale: Disclosure of the offer of compensation to buyer agents (including non-agency relationships defined by state law) will reinforce transparency for the clients and consumers working with MLS participants and subscribers in a real estate transaction.

Amendments to NAR MLS Policies

- **New MLS Policy Statement 8.4 – Services Advertised as “FREE”:**
- *MLS Participants and Subscribers must not represent that their brokerage services to a client or customer are free or available at no cost to their clients, unless the Participant or Subscriber will receive no financial compensation from any source for those services.*
- **Rationale:** While REALTORS® have always been required to advertise their services accurately and truthfully, and many REALTOR® services have no cost to the recipient, this change creates a bright line rule on the use of the word “free” that is easy to follow and enforce. These benefits outweigh the fact that this bright line may result in REALTORS® being unable to use the word “free” for some services they provide at no cost to the recipient.

Amendments to NAR MLS Policies

- **New MLS Policy Statement 8.5 – Services Advertised as “FREE”:**
- *MLS Participants and Subscribers must not, and MLSs must not enable the ability to, filter out or restrict MLS listings that are searchable by and displayed to consumers based on the level of compensation offered to the cooperating broker or the name of a brokerage or agent.*
- **Rationale:** These changes reflect the recent developments in real estate brokerage services, evolving broker business models, and how online marketing and searching of listings have evolved.

Amendments to NAR MLS Policies

- These policies take effect Jan. 1, 2022, though MLSs could implement them earlier if they choose.
- MLSs must implement the changes no later than March 1, 2022.
- Please check with your MLS to see when they will implement the changes.
- For more information, please go to:

AMENDMENTS TO THE TENANT PROTECTION ACT

Tenant Protection Act

- Prohibits landlords from collecting:
 - Security deposit greater than 1 month rent
 - Advances on rent other than 1st month

Tenant Protection Act-Amendment

- Exempts “Seasonal Use Dwelling Unit” (SUDU) from security deposit and rent advances
- To qualify for SUDU must on “seasonal use dwelling unit registry”
- If all requirements are not meant, no exemption and TPA applies

Tenant Protection Act-Amendment

- To qualify as a SUDU the rental must meet all the following requirements:
- The lease expressly provides that:
 - (i) the dwelling unit is registered as a seasonal use dwelling unit, indicating the local or county government agency with which it is registered; and
 - (ii) the occupancy of the tenant is only for seasonal use not to exceed one hundred twenty days or a shorter period provided for in the lease; and
 - (iii) such tenant has a primary residence to return to, the address of which is expressly provided in the lease; and

Tenant Protection Act-Amendment

- To qualify as a SUDU the rental must meet all the following requirements:
 - Such dwelling unit is not rented as a seasonal use dwelling unit for more than one hundred twenty days during each calendar year; and
 - The local government with jurisdiction for building administration over such unit, the county in which such unit is located, or the state shall have adopted a seasonal use dwelling unit registry; and
 - Such unit shall be registered by filing a copy of the seasonal use lease and such additional information as the local government, county, or state agency that administers such registry may require.

Tenant Protection Act-Amendment

- To qualify as a SUDU the rental must meet all the following requirements:
 - Such dwelling unit is not rented as a seasonal use dwelling unit for more than one hundred twenty days during each calendar year; and
 - The local government with jurisdiction for building administration over such unit, the county in which such unit is located, or the state shall have adopted a seasonal use dwelling unit registry; and
 - Such unit shall be registered by filing a copy of the seasonal use lease and such additional information as the local government, county, or state agency that administers such registry may require.

Tenant Protection Act-Amendment

- If there is no local, county or state registry, the property would remain subject to the deposit/advance provisions of TPA and would not be able to claim the exemption.

Tenant Protection Act-Amendment

- If a licensee is listing property for seasonal use and collecting more than one month's rent as a security deposit and/or more than one month's rent licensee would be required to verify that the property is registered as a "seasonal use dwelling unit" pursuant to the statute.
- If the property is not registered, the licensee may be liable for collecting more than one month's rent as a security deposit or more than one month's rent as an advance.

Tenant Protection Act-Amendment

- License required to verify compliance as a SUDU
- These obligations are no different than a licensee's responsibility to verify the legality of a rental property generally or where permits are required to rent.

Tenant Protection Act-Amendment

- At this time NYS does not have a registry
- County and local government is the most logical place for this to be done
- Many municipalities have rental permits already
 - SUDU would be a logical “add on”

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

COURT/DOS DECISIONS

DOS v GTRM

- Brokerage GTRM (and other entities)
- CB is Corporate Broker
- PG is President of GTRM
- SP is Salesperson
- MP is Member of the Public

DOS v GTRM

- MP filed complaint against CB and SP
- MP went to SP to find apartment
- SP was not licensed at the time

DOS v GTRM

- MP gave SP \$1,650 security deposit
- MP did not get unit
- GTRM refused to return security deposit

DOS v GTRM

- Investigation uncovered many violations
 - PG not a licensed broker
 - Commingling
 - Negative escrow balance
 - Unlicensed activity
 - And many others!!!

DOS v GTRM

- Many GTRM “salespeople” were unlicensed
- PG admitted there were no escrow accounts
- Tried to change admission
- Escrow account with a negative balance
- MP deposit into business account

DOS v GTRM

- CB admitted that PG paid for use of license
- \$180/week
- CB had no involvement with brokerage
- Not an officer
- No control over bank accounts

DOS v GTRM

- Unearned commission
- Paying commission to unlicensed individuals
- Commingling
- Fraud
- Untrustworthy and Incompetent

DOS v GTRM

- availing his or her license to another person so as to enable that person to act as a real estate broker
- Failure to supervise
- Brokers license revoked for multiple entities

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...IT'S COMING

The Painful Part

- Oregon passed a law banning personal letters
- Many are states are looking into similar legislation
- Legislative Steering Committee directed NYSAR staff to investigate
- Staff will report back to appropriate WG and Committee