

2022

LEGAL UPDATE

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DECEMBER

FREE MONTHLY

Legal Hotline

Monday-Friday

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

518-436-9727

Welcome!!!

- 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

2023 Dates

January 17

February 21

March 21

April 18

May 16

June 12

July 18

August 22

September 12

October 17

November 14

December 19

How to Register

- NYSAR.com
- Education
- Legal Update CE Course
- Register for a legal update

ARE COLD CALLS STILL PROHIBITED?

Are cold calls still prohibited?

YES

When Will the State of Emergency Expire?

- NO COLD CALLS
- The law is not industry specific and is triggered statutorily by **any** SoE
- Currently multiple SoE's in effect
- Only when all 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;**

NEW PROTECTED CLASS UNDER NYS HUMAN RIGHTS LAW

Executive Law §296(5)

(a) It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right to sell, rent or lease a housing accommodation, constructed or to be constructed, or any agent or employee thereof:

*(1) To refuse to sell, rent, lease or otherwise to deny to or withhold from any person or group of persons such a housing accommodation because of the race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, **status as a victim of domestic violence**, lawful source of income or familial status of such person or persons, or to represent that any housing accommodation or land is not available for inspection, sale, rental or lease when in fact it is so available.*

Executive Law §296(5)

(a) It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right to sell, rent or lease a housing accommodation, constructed or to be constructed, or any agent or employee thereof:

(2) To discriminate against any person because of race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, status as a victim of domestic violence, lawful source of income or familial status in the terms, conditions or privileges of the sale, rental or lease of any such housing accommodation or in the furnishing of facilities or services in connection therewith.

Executive Law §296(5)

(a) It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right to sell, rent or lease a housing accommodation, constructed or to be constructed, or any agent or employee thereof:

(3) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of such housing accommodation or to make any record or inquiry in connection with the prospective purchase, rental or lease of such a housing accommodation which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, status as a victim of domestic violence, lawful source of income or familial status, or any intent to make any such limitation, specification or discrimination.

Definition Real Property Law §227-d

“such person is or has been, or is a parent accompanied by a minor child or children who is or has been, in a situation in which such person or child is a victim of an act that would constitute a violent felony offense as enumerated in section 70.02 of the penal law, or a family offense as enumerated in subdivision one of section eight hundred twelve of the family court act, and such act is alleged to have been committed by a member of the same family or household, as defined in subdivision one of section eight hundred twelve of the family court act.”

A 9601-B / S 8417-B Memo

Domestic violence remains a pervasive issue in our society which can show up in a variety of forms and across a variety of different types of relationships. The Centers for Disease Control and Prevention reports that 1 in 4 women and 1 in 7 men will experience severe physical violence by an intimate partner in their lifetime.

Domestic violence affects many New Yorkers, and further, has a disproportionate impact on marginalized communities, including people of color and LGBTQIA+ individuals.

NYS Protected Classes

Race

Color

Sexual orientation

Military status

Age

Marital status

Familial status

Creed

National origin

Gender identity or expression

Sex

Disability

Lawful source of income

Status as a victim of domestic violence

Federally Protected Classes

Race

Color

National Origin

Religion

Familial Status

Disability

Sex (including gender identity and sexual orientation)

Federal Disparate Impact

Federal law also protects limited English proficiency and criminal background under the disparate impact theory.

Federal Disparate Impact

A housing provider violates the Fair Housing Act when the provider's policy or practice has an unjustified discriminatory effect, even when the provider had no intent to discriminate.

Federal Disparate Impact

Under this standard, a facially-neutral policy or practice that has a discriminatory effect violates the Act if it is not supported by a legally sufficient justification.

Federal Disparate Impact

Thus, where a policy or practice that restricts access to housing on the basis of limited English proficiency or criminal history has a disparate impact on individuals of a particular race, national origin, or other protected class, such policy or practice is unlawful under the Fair Housing Act if it is not necessary to serve a substantial, legitimate, nondiscriminatory interest of the housing provider, **or if such interest could be served by another practice that has a less discriminatory effect.**

NEW CE REQUIREMENT

CE

For all individuals whose real estate license expires on or after September 21, 2022, there are new requirements for continuing education that must be met. Please take note that the DOS is using the date the license actually expires, not the date on which the renewal is made.

CE

Licensees are now required to take 2 hours of implicit bias training and 2 hours of cultural competency training every 2 years as part of the 22 ½ hours of continuing education.

CE

Licensees will now be required to complete: 3 hours of fair housing and/or discrimination in the sale or rental of real property or an interest in real property; 2 ½ hours of ethical business practices; 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; 1 hour of instruction pertaining to the law of agency except in the case of the initial two-year licensing term for real estate salespersons, two hours of agency related instruction must be completed.

CE

Under the new format, licensees now have 11 1/2 hours of required subjects and 11 hours of elective subjects per 2 year renewal cycle. As a reminder, all licensees are now required to take 22 ½ hours of continuing education to renew their license. There are no longer any exemptions for brokers regardless of how long the broker has been licensed or if they have been exempted from CE in the past.

CE

3 hrs Fair Housing

2 ½ hrs ethical business practice

2 hours implicit bias

2 hrs cultural competency

1 hr legal update

1 hr agency (2hr if 1st license renewal)

11 hr electives

CE

NYSAR has scheduled a number of CE courses for implicit bias and cultural competency. To see the schedule of courses please click here: <https://www.nysar.com/education/nysar-course-schedule/>

For more information of Fair Housing related matters, please visit NYSAR's Fair Housing webpage at: <https://www.nysar.com/fair-housing/>

WHO PAYS FOR REFERRALS AND LEADS?

§ 442. Splitting commissions

1. No real estate broker shall pay any part of a fee, commission or other compensation received by the broker to any person for any service, help or aid rendered in any place in which this article is applicable, by such person to the broker...unless such a person be a duly licensed real estate salesperson regularly associated with such broker or a duly licensed real estate broker or a person regularly engaged in the real estate brokerage business in a state outside of New York;

RPL § 442-a. Compensation of salespersons; restrictions

No real estate salesperson in any place in which this article is applicable shall receive or demand compensation of any kind from any person, other than a duly licensed real estate broker with whom they associated, for any service rendered or work done by such salesperson in the appraising, buying, selling, exchanging, leasing, renting or negotiating of a loan upon any real estate.

But Why?

- Referrals are deemed to be a licensed activity (DOS 91-52)
- Referrals are based upon the successful:
 - Signing of an agreement
 - Consummation of sale
 - Retention as client or customer

Payment of referrals

- Referrals can only be paid:
 - Broker to broker
 - Broker to associated licensee
- Associate brokers and salespersons are prohibited from making referral payments to or collecting referral payments from any person or entity except the broker they are associated with.

What about leads?

NYS Attorney General Opinion:

We have held that it was not a violation of the statute to make payments to persons who did no more than provide the names of possible customers...This is a principle which, loosely construed, may be subject to abuse, and I think it ought not to be extended by further construction.

Leads

- Payment to non-licensee is payable upon supplying name(s)
- Payment is not conditioned upon anything other than the providing of names(s)
- Amount of payment is not based upon the listing, sale, rental price etc. or likelihood of success
- Payment should be a flat fee

WHAT FORMS ARE COOPERATING BROKERS ENTITLED TO?

Forms used for sale and rental

- Agency disclosure
- Housing & Antidiscrimination notice
- Reasonable modification and accommodation
- Listing agreement
- Exclusive right to represent
- Lead paint
- Property condition disclosure

Agency disclosure

- Licensees are not required to, nor can they be forced to provide agency forms to another broker.
- The only agency disclosure form a broker is required to retain is one that was presented by a licensee to the consumer on behalf of the brokerage.
- The broker is not required to and should not retain the form of the other broker involved in the transaction.
- Licensees must only disclose for whom they are acting and in what capacity (19 NYCRR §175.7)

Housing and antidiscrimination notice

- A real estate broker shall be responsible to ensure that each individual licensed pursuant to Article 12-A of the New York Real Property Law and associated with such broker provides to a prospective purchaser, tenant, seller, or landlord.
- A real estate broker, licensed real estate salesperson, or licensed associate broker that provides the disclosure notice required pursuant to this section by hardcopy, shall obtain a signed acknowledgment from the prospective buyer, tenant, seller, or landlord. Such signed disclosure notice shall be retained for not less than three years.
- A real estate broker, licensed real estate salesperson, or licensed associate broker that provides the disclosure notice required pursuant to this section by email, text, electronic messaging system, or facsimile, shall maintain a duplicate copy of such disclosure and shall retain the same for not less than three years.
- There is no law or rule requiring a cooperating broker to receive a copy of the notice or be required to retain the notice.

Reasonable modification and accommodation notice

- A real estate broker shall be responsible to ensure that each individual licensed pursuant to Article 12-A of the New York Real Property Law and associated with such broker provides notice with regard to available housing accommodations.
- There is no provision requiring brokers to provide proof of notice to the consumer or provide a copy of the notice that was provided to the consumer to cooperating brokers.

Listing agreement/Exclusive right to represent

- Listing agreement/exclusive right to represent is a contract between a consumer and a broker for services being provided.
- Cooperating brokers are not entitled to see the listing agreement/exclusive right to represent for any reason.

Lead paint disclosure

- Lead paint is required to be filled out by sellers/landlords when selling/leasing target housing.
- The lead paint disclosure form is then provided to the buyer/tenant pursuant to lead paint disclosure rule.

Property condition disclosure statement

- The Property Condition Disclosure Act requires the seller of residential real property to cause this disclosure statement or a copy thereof to be delivered to a buyer or buyer's agent prior to the signing by the buyer of a binding contract of sale.

How it works in the real world

- A cooperating broker is prohibited from requiring the agency disclosure, housing & antidiscrimination notice, reasonable modification and accommodation, listing agreement, and/or exclusive right to represent from another broker.
- A cooperating broker is prohibited from withholding commissions from another broker for failure to provide and of the aforementioned forms.
- Such forms are between the consumer and the broker required to provide such forms.
- There is no legitimate business reason for a cooperating broker to request the aforementioned forms.

STATEWIDE FORMS UPDATE: EAVESDROPPING

Eavesdropping-Penal Law

- §250.00(2) “Mechanical overhearing of a conversation means the intentional overhearing or recording of a conversation or discussion, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device or equipment.”

Eavesdropping-Penal Law

- §250.05, sets forth the crime of “eavesdropping” where “a person is guilty of eavesdropping when he unlawfully engages in wiretapping, mechanical overhearing of a conversation, or intercepting or accessing of an electronic communication.”

Eavesdropping-Penal Law

- Audio recording is a crime unless the person recording the conversation is a participant in the conversation.
- Sellers are prohibited from using audio recordings during showings unless seller is showing the house and is a part of the conversation.

Eavesdropping-Penal Law

- Licensees who are aware of sellers intending to use audio recordings must warn seller not to do so
- Licensees must advise all cooperating brokers and consumers if seller is using audio recordings and receive their written consent to be recorded

Eavesdropping-Penal Law

- Class E Felony
- Violation of license law if not disclosed
- Recent case law supports privacy
- Licensees should not record their own clients as it may be seen as a breach of fiduciary duties (no caselaw)
- The use of video recordings is permitted and is not required to be disclosed for security purposes

New forms for 2023

- Presence of audio/video recording devices
 - Seller disclosure
 - Buyer disclosure
 - Recommended language for listing agreements

Seller/Landlord disclosure audio/video

Owners/Landlords/Property Managers are advised that it is in violation of NYS Penal Law to mechanically overhear a conversation by having any device (or devices) recording, streaming or otherwise documenting the conversation of an individual during real estate-related activities at the property (open houses, showings etc.) if you are not a party to that conversation.

If such a device is present and operating in the property, this disclosure must be completed. Individuals entering the property will be notified that such a device is present and operating in the property. Such devices may include but are not limited to: devices used for smart homes; security; computers; web cams, nanny cams or other covert devices.

DISCLOSURE

The property set forth above has a device that can record, stream or otherwise document conversations of individuals that enter the property.

The device is enabled and may record, stream, or transcribe any conversation inside the property.

CAUTION: Buyers/Tenants/Cooperating Brokers should be aware that any conversation conducted inside the property may be available to the party utilizing the device.

The device has been deactivated and will not record, stream, or transcribe any conversation inside the property.

I have received and read this disclosure notice. I authorize and direct my agent to provide a copy of this disclosure notice to any prospective purchaser/tenant/cooperating broker acknowledging their consent prior to a showing.

Buyer/Tenant disclosure audio/video

Buyers/Tenants are advised that Sellers/Landlords may have the ability to mechanically overhear a conversation by having any device (or devices) recording, streaming or otherwise documenting the conversation of an individual during real estate-related activities at any property that is being shown (open houses, showings etc.). Such devices may include but are not limited to: devices used for smart homes; security; computers; web cams, nanny cams or other covert devices.

Absent a disclosure from a Seller/Landlord that there are no devices present, Buyers/Tenants should presume that every property being shown may have a device present that can overhear every conversation. Buyers/Tenants should not have conversations in any property that they do not want the Seller/Landlord to overhear.

I have received and read this disclosure notice. By signing below, Buyer/Tenant understands and acknowledges that Seller/Landlord may have access to the audio portion of any conversation conducted at the property.

Listing agreement language audio/video

Owners/Landlords/Property Managers are advised that it is in violation of NYS Penal Law to mechanically overhear a conversation by having any device (or devices) recording, streaming or otherwise documenting the conversation of an individual during real estate-related activities at the property (open houses, showings etc.) if you are not a party to that conversation. If such a device is present and will be operating at any time a potential Buyer/Tenant is viewing the property, the Seller/Landlord/Property Manager understands that the listing agent must disclose the presence of the device.

The property does does not have a device that can mechanically overhear a conversation.

Listing agreement language audio/video

The property ● does ○ does not have a device that can mechanically overhear a conversation.

- If “does” then that would trigger the seller disclosure form
- Licensees are obligated to disclose the presence of an active audio recording device
- “any lawful instruction” fiduciary duty

Listing agreement language audio/video

<https://www.nysar.com/legal/forms/>

DOS REQUIRED FORMS IN OTHER LANGUAGES

Translated forms

- NYS has requirement that state agencies provide documents translated in 7 different languages
- These are the top 7 languages spoken in NYS

Translated forms

- NYSAR has asked DOS to provide required forms in other languages.
- DOS had stated that “statutory forms” and “regulatory forms” must appear in English as that is how they appear in the law or regulation.

Translated forms

- DOS now provides agency in multiple languages.

Translated forms

- Agency disclosure for buyer/seller and landlord/tenant
 - English
 - Spanish
 - Haitian-Creole
 - Italian
 - Korean
 - Russian
 - Chinese

Translated forms

- The agency disclosure has same formatting as English
- Utilize for consumers with Limited English Proficiency
- You do not need to be familiar with the other language to use the form
- If translated form is used, attach English form for file
- Consumers should not have to sign multiple forms

Best practice

- Not all DOS statutory/regulatory forms are translated
 - PCDS
 - Housing and antidiscrimination
- NYSAR has inquired whether such forms will also be translated
- NYSAR will advise members if DOS provides such translations

Best practice

- There will be a combination of English and translated forms used
- If you offer a form electronically you should provide all versions of the form that are translated

Best practice

- If licensee not proficient in foreign language, there are many free aids to utilize
 - Online translator (text and voice)
 - Applications (voice and text)
 - Friend or family of consumer
 - Community groups
 - Other licensee in office
 - Consumer attorney

NYSAR forms

- Statewide forms committee is looking into having NYSAR forms translated.
- NYSAR would utilize an approved federal court translation service

Spanish-example

Formulario de divulgación para comprador y vendedor del estado de Nueva York

ESTE NO ES UN CONTRATO

La ley del estado de Nueva York exige que los titulares de licencias de bienes raíces que actúan como agentes de compradores y vendedores de propiedades informen a los posibles compradores o vendedores con quienes trabajan sobre la naturaleza de su relación de representación y los derechos y obligaciones que de ella derivan. Esta divulgación le ayudará a tomar decisiones informadas sobre su relación con el corredor de bienes raíces y sus agentes de ventas.

Es posible que durante la transacción reciba más de un formulario de divulgación. La ley puede exigir que cada agente que ayude en la transacción le presente este formulario de divulgación. Un agente de bienes raíces es una persona cualificada para asesorar sobre bienes raíces.

Si necesita asesoría legal, tributaria o de otro tipo, consulte a un profesional de ese campo.

Chinese-example

纽约州买方和卖方披露表

本表并非合同

纽约州法律要求房产买方或卖方的持照不动产代理人告知其潜在买方和卖方他们之间代理关系的性质以及所产生的权利和义务。本披露表将帮助您处理与不动产经纪人及其销售代理的关系时做出明智的选择。

在整个交易过程中，您可能会收到不止一份披露表。法律可能会要求协助进行交易的每位代理人都向您提供一份披露表。不动产代理人是指有资格向您提供不动产相关建议的人员。

如果您需要法律、税务或其他方面的建议，请咨询相关领域的专业人员。

Link to DOS forms

<https://dos.ny.gov/real-estate-broker>