

MASSACHUSETTS LICENSE LAW

Massachusetts law provides that anyone who for another and for a fee, commission or other valuable consideration or in the expectation of receiving such, does any of the following must be licensed as a real estate agent: advertises and/or holds himself or herself out as engaged in the business of selling, renting, leasing, negotiation, exchanging, purchasing and dealing in real estate or options for real estate. Receiving anything of value as part of a transaction is enough to trigger requirement regardless of nature, amount or expectations. **Brokers** may work independently, but a **salesperson** must work under a broker as either an employee (W-2 income) or an independent contractor (1099 income).

BOARD OF REGISTRATION OF REAL ESTATE BROKERS AND SALESPERSONS
1000 Washington Street, Suite 710, Boston MA 02118
(617) 727-2373

Purpose of the law: To protect the public interest. The Legislature **enacts** the law (which is permanent unless otherwise stated); the Board or its agents **promulgates** and administers. The Board exists under the Division of Professional Licensure.

- ◆ Law effective January 1, 1960
- ◆ Five (5) member Board appointed by governor
- ◆ One of members appointed chairperson by governor
- ◆ Term of office of each member is 5 years, with one term expiring each year; members may be reappointed
- ◆ Three (3) members must be licensed brokers with at least seven (7) years experience each
- ◆ Two (2) members not licensed and represent the public
- ◆ All members serve without pay
- ◆ Board meets a minimum of four times a year wherever it chooses
- ◆ At least three (3) members must be present (quorum) to conduct a valid meeting at any place decided by Board
- ◆ All receipts and revenue collected by Board go to state treasury; Board expenses come from annual state budget
- ◆ Written record must be kept which is open to public inspection

QUALIFICATION FOR LICENSURE

Salesperson: 18 years of age or older; complete 40 classroom hour salesperson course at an approved school; pass the written state exam.

Broker: Be licensed as a salesperson and have been actively associated with a licensed broker or brokers for at least three years immediately prior (within last 5 years) to application for a minimum of 25 hours per week; complete 40 classroom hour course; pass state exam; be bonded.

A real estate candidate with a criminal conviction must request permission from the Board for licensing. Determination is case-by-case. An agent shall report to the Board within **thirty days** of his/her conviction of any crime including any misdemeanor or felony under state or federal laws.

1. Licenses are renewed every 2 years (biennially) on agent's birthday, except first license goes from date of passing the exam to licensee's third birthday. As of 1/1/1999, all agents must complete 12-hours Continuing Education (no exam) each renewal period to maintain an active license or reactivate one. If agent chooses to go in-active, they may still make referrals to agencies.
2. An agent who doesn't take CE or pay fee has an expired license and cannot work or receive commissions. License can be reinstated by taking CE and paying a fee.
3. A person may not hold a broker and a salesperson license at the same time.
4. The active experience as a salesperson begins when the Board is notified in writing of salesperson's association with a broker. Employing broker must furnish Board with names, addresses and license numbers of all licensees engaged by broker at commencement/termination of employment or association.
5. **Non-residents** may be licensed as agents if they file a written power of attorney with Chair of the Board to accept legal summons issued to the non-resident. A **resident** agent must maintain a legal address in the Commonwealth.
6. A licensed broker or salesperson shall display his/her license or copy conspicuously in his or her usual place of business or branch office.
7. **Reciprocity** means one state honoring the licensee of another state.
8. An entity (other than a sole proprietor) must hold a **broker** license in its organizational name, and a designated officer/partner authorized to act on its behalf must be broker of record (who may NOT operate independently without written permission of the entity). Upon death/disability/**severance** of sole designated broker, entity may continue to operate for 1 year if it diligently qualifies another.
9. **Death of sole proprietor:** Upon application by a legal representative, Board issues a temporary/non-renewable license to such person or someone designated by him/her and approved by the Board. Temporary license requires a fee and bond and is effective for not more than 1 year from **date of death**.
10. When two or more brokers occupy the same business offices, the Board must be informed of their non-financial contractual relationship.
11. A broker desiring to operate under a business or trade name must indicate proposed name to Board. A certified copy of doing-business-as (DBA) certificate on file in the city where such business is conducted must be sent to the Board.
12. A broker cannot offer property for sale or lease without permission of owner or on terms or conditions other than those authorized by owner. A "For Sale" sign may not be placed on property without written permission of owner.
13. A broker may not collect a commission from **both** buyer and seller without their prior knowledge and consent.
14. All compensation payable to salesperson must come from employing broker **only**. Anything given to salespeople by client must be accepted on behalf of broker.
15. No salesperson may work for more than one broker at the same time.
16. A broker may not hire an unlicensed **salesperson** (unlicensed clerical staff is fine).

17. An unlicensed person cannot recover a commission in court unless s/he was licensed at time realty services were rendered. A licensed salesperson may bring suit against an unlicensed broker, not client, for his/her portion of the fee.
18. Any legal action concerning unlicensed agents does NOT affect any contract between seller and buyer negotiated by unlicensed persons.
19. Whoever, without being licensed, acts as a broker or salesperson or advertises as such, shall be punished by a fine of not more than **\$500 by a court of law**.
20. A broker may not pay a "finder's fee" to someone who is not licensed.
21. No real estate agent shall advise against the use of the services of an attorney or provide legal advice/services (use preprinted forms only, do not change form and do not charge for filling it out).
22. **ALL** offers (and counteroffers), written or verbal, **must** be brought to the client (unless agent holds a power of attorney).
23. Real estate commissions are established by agreement of agency/client (multiple listing services (MLS) are private networks of agencies but do not set commissions).

LOSS OF LICENSE

The Board may **suspend, revoke** or **refuse** to renew for the following reasons:

1. A license which it has found to have been obtained by false or fraudulent representation, or licensee knowingly made any substantial misrepresentation.
2. Licensee acted in **dual** capacity of agent and undisclosed principal (either sale or rental) in same transaction. An agent shall not buy, sell, rent, mortgage, or acquire any interest in property, or represent a client in which the agent or agent's kin (by blood, marriage, or business associate) has a personal financial interest, unless the agent fully discloses in writing to all parties the nature of her interest and parties provide the agent with written acknowledgment of such disclosure.
3. Act for more than one party to a transaction without knowledge and consent of all.
4. Failure within a reasonable period of time to account for or remit any monies belonging to others, which have come into his or her possession as an agent.
5. Paid commissions or fees to or divided the same with any person who, being required to be licensed as an agent in this or any other state, is NOT so licensed.
6. Accepted, given or charged any undisclosed commission, rebate or profit on expenditures for a principal – it is a potential conflict of interest.
7. **Induced** any party to break a realty contract for the personal gain of licensee.
8. Commingling the money of the principal with the agent's funds.
9. Failed to give to *both* buyer and seller a copy of any real estate contract.
10. Accepted a **net** listing - agreement to sell/lease where client gets fixed amount and agent keeps **excess**. The commission amount is unspecified.
11. Proved to have violated Massachusetts Fair Housing Law (automatic suspension).

REAL ESTATE \$5,000 BROKER SURETY BOND

- ◆ Every broker (not salesperson), whether a live person or entity, whether active or inactive, is required to file with the Board a surety bond of \$5,000, for the benefit of any person harmed by the loss of funds held by broker.
- ◆ This bond is provided by a bonding company (the surety or obligor) for a small fee paid by broker (principal) to be made payable to the Commonwealth (obligee) and collected by the Board.
- ◆ The bond money **cannot** be used to defray legal expenses incurred in the action. This bond must remain current in order to maintain an active or inactive broker license.

LICENSE NOT NEEDED

The following persons do NOT need a real estate license to perform these functions:

- ◆ People doing real estate transactions for themselves (not helping others), including the sale of multiple developments or renting in large complexes (residential or commercial).
- ◆ Purely salaried employees of the property owner, such as apartment managers.
- ◆ Attorneys, auctioneers, appraisers, home inspectors, mortgage brokers, insurance agents and other licensed professionals practicing their profession in a real estate transaction.
- ◆ Public officers or employees performing official duties; trustees or someone acting under a court order, such as executors, administrators or guardians.
- ◆ Attorney-In-Fact: person acting under a written instrument called **power of attorney**; notarized and recorded; is not valid after death.

BOARD PROCEDURES

The Board (or its agents) has the power to conduct public hearings upon written complaint or on its own initiative with reason:

- ◆ At least 10 days written notice before hearing and a copy of complaint or charges must be sent to accused party.
- ◆ Records may be ordered by subpoena and witnesses summoned.
- ◆ Party has right to counsel and to cross examine witnesses but is not legally **entitled** to have an attorney provided by the Board.
- ◆ Meetings are held at a location of the Board's choosing.
- ◆ Unfavorable decisions may be appealed within 20 days to a superior court
- ◆ While under appeal, license must be forwarded to Board within 7 days of receipt of notice of suspension or revocation.

CONSUMER PROTECTION LAWS

MASS GENERAL LAWS CHAPTER 93A

- ◆ Originally enacted in 1967 to protect against unfair and deceptive business acts and practices; revised in 1969 to allow private right of action. Does not apply to consumer-to-consumer (buyer against seller) law suits. Provides for up to triple damages and attorney's fees.
- ◆ Intent to deceive not required. Liability for failing to disclose what is required or providing false or misleading information, including opinion. Puffing is gross exaggeration (not allowed).

LEAD PAINT

- ◆ Landlord - All property constructed prior to 1978 and occupied by a child under six years of age shall be delead. New tenants must be given a Lead Paint Notification and Tenant Certification Form. Landlord must delead for new or existing tenants with children. No parental waiver allowed. No turning away qualified tenant because of children.
- ◆ Seller - Prospective buyers of residential property built pre-1978 must be notified of their lead paint rights by Department Of Public Health Property Transfer Lead Paint Notification prior to signing P&S. The buyer may waive 10 day lead paint inspection provision. Buyer has 90 days to delead if child under six resides there.

OTHER HAZARDS

- ◆ Known hazards (i.e. underground fuel tanks, asbestos, UFFI, chlordane, mold or radon) must be disclosed – presence does not prohibit sale. Radon and mold are natural; radon is radioactive and seeps in through cracks and water; mold grows in moisture; both get trapped by weather-tight homes.
- ◆ Removal of hazards is regulated, may not be put in local dump. Fuel tank disposal requires fire department. Asbestos is dangerous in its friable state, requires encapsulation (as does lead) to remove. Mold is either scrubbed away or material must be removed. Radon can be vented out.

SEPTIC

- ◆ Title 5 requires septic system to pass within 2 years prior to sale (3 if pumped every year) or 6 months after. Seller and buyer decide who brings it into compliance. Lender may be unwilling to close without septic in compliance.

SMOKE AND CARBON MONOXIDE DETECTOR LAWS

- ◆ Realty sales require a smoke detector/carbon monoxide certificate signed by local fire chief. Location and functionality depend on when building is erected and substantially renovated. New construction requires detectors to be hard-wired with battery powered back-up (must be both ionized and photoelectric). One on every level, outside and inside bedrooms, bottom of stairs. Photoelectric only needed within 20 feet of kitchen/bathrooms. As of 3/31/06, all properties must have carbon monoxide alarms on every habitable level. Battery-operated and plug-ins are acceptable for buildings prior to 12/31/06.

ESCROW/TRUST ACCOUNTS

1. The only person legally entitled to hold a deposit is **seller**. Usually parties agree seller's broker will hold it in escrow until closing. Broker does not have to do this – it is an accommodation for client. Deposits must be immediately deposited. Broker shall be responsible for such money with proper accounting, but has no personal claim to it. The account may be interest or non-interest bearing. If interest bearing, parties agree who gets the interest.
2. Escrow records shall indicate the date and from whom broker received the money, date deposited, check number, date of withdrawal and name of the person receiving it, and other pertinent information concerning the transaction. Every broker shall also keep a copy of each check deposited into and withdrawn from the account for **three years** from the date of issuance. All funds and records shall be subject to inspection by the Board.
3. A salesperson shall immediately turn over all deposit money received to the employing broker. No salesperson shall at any time hold client funds.
4. A rejected or withdrawn offer and deposit must be returned to offeror.
5. The form of deposit (cash, check, note or anything of value) must be clearly shown on all offers and sales contracts.
6. Broker may not bring uncashed checks to closing. That means the checks have not cleared. Broker may not **commingle** escrow money with broker's own accounts.
7. Escrow funds held by broker as **escrowee** or **escrow agent** have absolutely nothing to do with broker's commission, although seller and buyer can give permission for some or all of the deposit to be converted at closing to commission money.
8. Both buyer and seller must agree when money is removed from escrow. A dispute requires a court order or settlement by the parties, not the discretion of the broker.

ADVERTISING

- ◆ Includes all written and verbal communication – internet/social media
- ◆ A broker shall not engage in false or misleading advertising. Records of advertising must be kept to prove property was available – no bait and switch.
- ◆ **Blind Advertising Prohibited** - Broker ads must include name of broker. Salespeople are prohibited from advertising under their own name but ads may name a salesperson as the contact for the agency.
- ◆ **Discriminatory Advertising Prohibited** - No ad shall indicate directly or indirectly unlawful discrimination against a protected class.

ADDITIONAL POINTS

- ◆ No broker or salesperson shall violate, or attempt to violate, directly or indirectly, or assist or abet the violation of, or conspire to violate any provision of the relevant licensing law, the regulations or orders of the Board.
- ◆ No agent shall practice while his/her ability to do so is impaired for any reason.

- ◆ Agent shall only assume duties and responsibilities for which s/he had adequate preparation and for which competency has been acquired and maintained.
- ◆ A real estate *broker* who is employed by **another broker** shall not engage any realty salespersons within that same agency.
- ◆ A seller's agent may only give a buyer the list of **all** licensed home inspectors and state consumer protection brochure. A buyer's agent with a written agency agreement with the buyer may recommend a particular home inspector.
- ◆ MASSHOUSING is a state agency that sells tax free bonds and securities to investors to raise funds in order to assist financing for first-time home buyers.

PROMOTIONAL SALES OF OUT OF STATE PROPERTY

- ◆ **Filing requirement:** No broker shall offer for sale in the Commonwealth an interest in real property which is located in a land development of another state unless the owner/developer registers such property with the Board and pays a fee. Such registration shall be renewed annually.
- ◆ **Inspections:** The Board may inspect such, the costs to be borne by the owner/developer. The Board shall issue a written report kept on file with the Board and maintained by the owner/developer during the time the development is registered for one year thereafter.
- ◆ **Advertising Notice of Registration:** Once the Board registers the development, the owner/developer must note the fact in all its subsequent advertisements in the Commonwealth.
- ◆ **Sales By Brokers:** It must be offered for sale and sold by a licensed Massachusetts broker. Such broker shall notify the Board in writing of such status within seven days of accepting the client.

TENANT FEES:

- ◆ Agents renting residential property must provide prospective tenant with a written notice at the **first meeting** which states **whether the tenant will pay any fee** for such service, the amount, the manner and time in which it is to be paid and whether any fee will be payable if a tenancy is not created. The tenant must agree to pay the fee. The notice must be signed by the agent, contain his/her license number, be signed by the tenant and contain the date such notice was given. When tenant declines to sign, the agent must note on the notice the tenant's name and refusal to sign.
- ◆ A copy of the notice shall be maintained by the broker for **three years** from the date on which the notice was provided to the tenant. Real estate brokers shall furnish the notice to the Board, its investigators or other agents upon request.
- ◆ Brokers shall maintain all rental listings and written documents that demonstrate the availability of an apartment at the time it was advertised for **three years** from the date on which such apartment is rented. Brokers shall maintain a copy of any check, money order and written cash receipt for any fees, deposits or payments made by a prospective tenant or actual tenant for **three years**.

AGENCY DISCLOSURE

1. An agent shall provide to a prospective purchaser or seller of real estate a notice developed and approved by the Board which clearly discloses the relationship of the agent with the prospective purchaser or seller. The notice shall be provided at the time of the **first personal meeting** for the purpose of discussing a **specific property**. All such records and notices are subject to inspection by the Board.
2. Where the broker has obtained the informed consent of both the purchaser and seller to represent them both, such broker must at that time, provide written notice to them of the **consensual dual representation**. A broker shall request a prospective purchaser or seller to sign and date such notice, provide the original to them and maintain a copy all notices with their records for **three years** from date on the notice.
3. If a prospective purchaser or seller **declines** to sign the notice, the broker shall indicate the date the notice was given to them, that the person declined to sign it, and the reason therefor, if any, given by the person.
4. No written notice to each prospective purchaser or seller who comes to an open house is required, but agents, by sign, poster, distributed listing literature or property description form must disclose the agency relationship more conspicuously than any other written terms.
5. Designated agencies must ensure agents do not communicate client confidential information deliberately or accidentally through direct discussions, overheard phone calls, faxes or emails.

TYPES OF AGENCY REPRESENTATION

SELLER'S AGENT: Broker and its subagents represent seller. They owe seller all fiduciary duties: obedience, undivided loyalty, full disclosure, confidentiality, full account and reasonable care.

BUYER'S AGENT: Broker and its subagents represent buyer. They owe buyer all fiduciary duties: obedience, undivided loyalty, full disclosure, confidentiality, full account and reasonable care.

DISCLOSED DUAL AGENT: A broker can work for both buyer and seller on the same property if broker obtains the informed consent of both parties. Broker is then considered a disclosed dual agent. This broker owes seller and buyer the duties of confidentiality and full account.

DESIGNATED AGENT: When a broker (the appointing or designating agent) designates agent in broker's office to represent either seller or buyer, such agent is the agent for that party with all the responsibilities of a seller or buyer agent. If that designating broker also designates another agent in the same office to represent the other party, this broker becomes a dual agent with all of the limitations stated above. Seller and buyer must consent to this arrangement. Allows and agency to represent both seller and buyer clients.

FACILITATOR (Deemed a nonagent): An agent providing seller and/or buyer limited services, but does not act as a full agent. Such agent must act honestly and accurately by disclosing known defects on the property, has a duty of full account but has no duty of confidentiality unless agreed to by the parties. Implied agency means facilitator is accepting more fiduciary duties than full account and confidentiality and may be treated legally as a full agent.