

Teamwork

A Playbook for Real Estate Teams

Real estate teams are increasingly common. For successful real estate agents, forming a team can be a way to leverage their success. When a successful real estate agent hires others to work for her or him as part of a team, it can, in many cases, increase the agent's profitability and visibility in the real estate market. Since team real estate largely developed after the passage of the Brokerage Relationships in Real Estate Transactions Act ("BRRETA"), there is no special regulation of teams. This has left brokers and agents with several questions, which are featured below, along with their answers.

1. **QUESTION:** Is there such a thing as a standard real estate team?

ANSWER: Real estate teams can vary from one or two successful agents hiring other agents and/or unlicensed support personnel to multiple team leaders hiring dozens of licensed and unlicensed persons, to work together as part of a large team. Large real estate teams sometimes operate like their own brokerage firm often within a larger brokerage firm. Most teams employ some degree of specialization with buyer agents, listing agents and agents who just focus on marketing, the preparation and administration of contracts, closing coordination or showings. Of course, all real estate brokerage activities may only be performed by real estate licensees.

2. **QUESTION:** As the team leader of a large team, which of my team members are required to be employees versus independent contractors?

ANSWER: The answer to this questions depends on how, when and under what circumstances each team member works. From the perspective of compliance with our federal labor and tax laws, calling someone an independent contractor or an employee does not necessarily make it so. It is always the substance of the business relationship that counts rather than what the relationship is called. Therefore, while a team leader may call a subordinate team member an independent contractor, a court or governmental agency may well decide that the relationship is truly one of an employer-employee. In fact, the IRS starts with the assumption that a person working for someone is an employee.

Most of the key factors that are used to evaluate whether a worker is an independent contractor or employee relate to the time, place and manner of the work performed by the worker. Courts and governmental agencies tend to look at the totality of the circumstances in deciding whether a worker is an employee or an independent contractor rather than any one factor. However, some of the key factors include the following:

a. *When does the worker work?* Independent contractors are generally not on a fixed schedule and are paid by the job rather than by the hour. So, for example, a team member required to work from 9:00-5:00 at the broker's office administering contracts would more likely be viewed as an employee than an independent contractor.

b. *Who controls how the work is performed?* Employees are normally provided the equipment they need to perform the job and are told how to do their work. For example, if a team member is provided with a cell phone and computer and regularly told how to do the worker's job, they are more likely to be seen as an employee rather than an independent contractor. For example, a licensee working for a team who is taught how to make marketing calls, makes such calls at a fixed time every day, and whose activities are supervised by a team leader would likely be an employee. However, an experienced licensee who makes marketing calls on his or her own

schedule, with no supervision, and who is paid by the number of leads he or she generates is likely an independent contractor.

c. *How is the worker paid?* A worker who is paid a salary, is restricted from working for others and does not share in the profits of the company is probably an employee.

Some factors which generally do not impact whether a person is an employee or independent contractor include where the work is performed, whether the worker is licensed by the state, the time or mode of the worker's pay and whether there is a formal employment agreement.

So, for example, a real estate licensee who handles contract administration for a set number of hours a week and for a fixed salary is likely an employee. A buyer's agent on a team who works for multiple buyers based upon the needs of the buyers and who is paid based on commissions is likely an independent contractor. Unlicensed support personnel are more likely to be employees rather than independent contractors due to the ministerial nature of their work.

Leaders of teams will often want to treat their workers as independent contractors because they then do not have to withhold taxes, Social Security and Medicaid. However, it is risky to do this across the board particularly with salaried persons performing routine tasks.

3. **QUESTION:** What kind of agreements should a team leader have with support personnel?

ANSWER: The type and nature of the agreements team leaders should have with support personnel are set forth in GREC Sub. Reg. 520-1-.07(6). Under license law, support personnel must have an agreement with both the licensee(s) for whom they work and the licensee(s) broker. The agreement must specify the duties to be performed by the firm and the tasks that are prohibited to such support personnel.

4. **QUESTION:** What type of agreement should team leaders have with each other and with other licensees working for the team?

ANSWER: First, while not required under license law, the team leaders should enter into written agreements with all subordinate team members to avoid any misunderstandings between the parties. Team leaders should also have an agreement with each other. Some of the more important issues for team leaders to address include the following:

- a. **Termination.** Team leaders should want the right to be able to terminate subordinate team members from their jobs at will, with or without cause, and with little or no advance notice. This gives the team leaders maximum flexibility to terminate subordinate team members who, for any reason, are not working out.

The termination of the agreement between team leaders can be much trickier. Some agreements provide for a fixed term where the agreement automatically terminates unless both team leaders agree to renew it. This gives the team leaders a chance to periodically decide whether to continue to work together as a team. Other agreements include a right on the part of team leaders to terminate the agreement after some notice period during which most of the affairs of the team are then wrapped up. Still other agreements include an automatic termination of the agreement vis-à-vis any team leader or member whose license, for example, is suspended or revoked.

- b. **Compensation.** The team leader(s) should want to clearly spell out the compensation of all subordinate team members and with each other during the term after the termination of the agreement.

c. Who gets the clients and prospects? While technically all clients belong to the broker, the rights of team members to work with clients, customers and prospects once they leave the team is critically important and should be decided in advance. Most team leaders are going to want to have some period of time when a departing subordinate team member does not contact prospects, customers and clients of the team. Other team leaders may allow the team member to leave with clients and prospects that the team member generated on his or her own.

As between the team leaders, dividing clients can be especially difficult when the team breaks up. Oftentimes, the team leaders agree that the compensation from the team's clients and customers will continue to be paid to the team (and divided in the same manner as if the team were continuing to operate) for some period of time after a team leader gives a notice of termination to other team leaders. Once a notice of termination is given, new clients and customers usually work with the individual team leaders as if they no longer belong to a team.

d. Disputes. A team leader is normally going to want to resolve all compensation and other disputes between subordinate team members or between the subordinate team member and the team leaders. With regard to disputes between the team leaders, agreements sometimes provide that the managing or qualifying broker of the brokerage firm with whom the team works will decide all such disputes. Alternatively, some agreements provide that disputes will be resolved through binding arbitration. What most team leaders want is to avoid litigation since that can be costly, time consuming and a distraction from performing brokerage services.

e. Who gets the team name and client and prospect contact lists? In some cases, the team name becomes a significant brand. The brand can be a valuable asset and who gets the use of the name after the termination of the team should be agreed upon in advance. Alternatively, there can be an agreement that neither party will use the team name or any similar name in the event of the termination of the team. The list of the team's past clients and potential clients is also valuable and who gets the use of such lists should also be agreed upon in advance. Usually, team leaders will agree that they will get a copy of client and prospect lists. In some cases, the team leaders also agree to jointly send out a notice of the termination of the team to clients, customers and prospects before any team members start to solicit such persons.

f. Who is responsible for the debts of the team? Normally, the team leader(s) will provide in an agreement that they are each responsible for their share of any debts and bills of the team up through the date of the termination of the team and any debts that might arise in wrapping up the affairs of the team. For example, if the team has employees who must receive two weeks' notice and salary before being terminated, each team leader would generally agree to be responsible for their portion of the salaries of the employees.

g. What happens if a team leader dies or becomes disabled? This may be one of the hardest issues for a team to resolve. If one of the team leaders dies, the other leaders usually agree that all commissions earned through the death of the team leader (and in some cases all commission on pending contracts) will be shared by the team members including the deceased member (whose share would be paid to the estate of the team leader).

With regards to being disabled, team leaders again have hard decisions to make depending on whether the disability is permanent or temporary. Many agreements provide for the dissolution of the team or the removal of the team leader from the team if one of the team leaders becomes permanently disabled. Usually, when a temporary disability of a few months or less, the other team leaders simply pick up the slack.

5. **QUESTION:** Should a team be some type of legal entity?

ANSWER: Nothing requires a team to be a legal entity. However, my recommendation is that a real estate team of any size become some type of incorporated entity, such as a corporation or limited liability company, for three reasons.

First, the team leaders are protected from individual legal liability if claims are brought by team members or as a result of the actions of team members. For example, if a team is an incorporated legal entity and a team member who is an employee of a team gets into a car accident while performing his or her job, any claim against the team will, in most cases, only be brought against the legal entity rather than the individual team leaders. Second, there can be tax advantages to being a legal entity. Third, in the event of a dispute between team leaders and/or team members, there is an established body of law to refer to help resolve the dispute.

6. **QUESTION:** If a real estate team is representing the buyer and seller in the same transaction, do they have to act in a dual agency capacity?

ANSWER: Whether the team acts in a dual agency capacity or a designated agency capacity will depend on the company's agency policy. Agency relationships are determined by who the brokerage firm represents in the transaction rather than who the licensees on a team represent. A brokerage firm representing both sides of the transaction can do so either in a dual agency or designated agency capacity. With designated agency, the broker must assign one or more licensees to exclusively represent the buyer and one or more different licensees to exclusively represent the seller. Therefore, the broker can designate one licensee with a team to exclusively represent the seller and another licensee with the team to exclusively represent the buyer. While the team in its own name cannot represent both sides of the transaction in a designated agency relationship (since only licensees can be designated agents), individual licensees on a team can do so, each exclusively representing a party in the transaction. Since BRRETA distinguishes between who a brokerage firm represents and how it is paid, the team can ultimately receive the selling and listing commissions in the transaction. The licensees on the team exclusively representing the buyer and seller in a designated agency capacity can also include their team affiliation under their names on the contract.

7. **QUESTION:** Do licensees need to disclose they are practicing as part of a real estate team in a designated agency transaction?

ANSWER: The answer to this question is yes. Under BRETTA, brokers and their affiliated licensees are required to disclose to clients "adverse material facts of which the broker has actual knowledge concerning the transaction" with regard to buyer clients and "material facts which the broker has actual knowledge concerning the transaction" with regard to sellers. While there is no case law on this subject, the close relationship between the agents, while possibly being an advantage in some transactions, can also be an adverse material fact in other situations and is certainly a material fact in most, if not all, transactions. The key area where issues could arise when team members are on both sides of a transaction is in the preservation of confidential information. Regardless of whether confidential information is ever actually shared between team members, the perception is that there is a high risk of this occurring. Such confidential information might include that the seller is getting a divorce, the highest price the buyer might pay, the lowest price that the seller might take, or information that the listing agent knows but is not required to disclose such as there being a pedophile in the neighborhood, a nearby road widening or a murder or suicide in the property. The concern is heightened if the relationship between the team members is very close, such as with a husband and wife team.

While there is a duty on the part of the licensees to disclose material relationships between the licensee and a party to the transaction in certain situations where the relationship could impair the judgment of the licensee relative to his or her client, there is no similar duty on the part of one

licensee to disclose material relationships with a licensee representing the other party in the same transaction.

To avoid this perception, my recommendation to teams representing both sides in a transaction is to make the same disclosure of material relationships between the licensees in a transaction that they would make when there is a material relationship between the licensee and a party in the transaction. So, for example, if different team members are representing the buyer and seller in a transaction, they should each disclose that they have a close business relationship because the licensees work for the same team. A husband and wife team representing different parties in a transaction should additionally disclose that they have a close familial relationship because they are on the same team and are married. If a husband and wife team are only representing the buyer, for example, no special disclosure should be needed since they are both acting to represent the best interests of that buyer.

With respect to confidentiality, I recommend that team members representing both sides in a real estate transaction:

- 1) remind their clients in writing to make confidential anything that they do not want the licensee to disclose; and
- 2) encourage clients in writing not to reveal confidential information to the licensee representing them (except for any information the client is required by law to disclose). An example of such a written disclosure when different team members are representing the buyer and seller in the same transaction is as follows:

Written Disclosure When Team Members Represent the Buyer and Seller in the Same Transaction:

Buyer and Seller acknowledge that the real estate licensees representing each of them exclusively in this transaction are part of the same real estate team and will share in the commissions being paid in this transaction. If team members have a material relationship with each other, beyond being on the same team, that relationship is disclosed below:

For the purposes of this disclosure a material relationship shall mean “any actually known personal, familial, or business relationship between the licensee(s) representing the buyer and the licensee(s) representing the seller in this transaction”.

With two exceptions set forth below, during the term of the brokerage relationship, each licensee shall keep confidential information directed to be kept confidential by express request or instruction of each licensee’s client. The exceptions to this requirement are: 1) information that the licensee is required to disclose by law or regulation; and 2) information that the licensee subsequently permits to be disclosed. Nevertheless, Buyer and Seller are encouraged not to reveal to the licensee their bottom line position in any real estate negotiation or other confidential information that they are lawfully allowed to keep confidential.

In conclusion, team real estate is here to stay. However, teams need to practice team real estate in a manner that protects both the team and its clients. Teams need to be especially careful when they are on both sides of the real estate transaction. In such situations, they need

to err on the side of over-disclosing the relationship between team members, to ensure that there is no confusion by the parties.

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