

FAQs regarding written buyer agreements – from the National Association of REALTORS®

The practice change requiring written agreements with buyers is triggered by two conditions: it only applies to MLS participants “working with” buyers and is triggered by “touring a home.” What does it mean to be “working with” a buyer?

- The “working with” language is intended to distinguish MLS participants who provide brokerage services to a buyer — such as identifying potential properties, arranging for the buyer to tour a property, performing or facilitating negotiations on behalf of the buyer, presenting offers by the buyer, or other services for the buyer —from MLS participants who simply market their services or just talk to a buyer — like at an open house or by providing an unrepresented buyer access to a house they have listed.
- If the MLS participant is working only as an agent or subagent of the seller, then the participant is not “working with the buyer.” In that scenario, an agreement is not required because the participant is performing work for the seller and not the buyer.
- Authorized dual agents, on the other hand, work with the buyer (and the seller).

How will state laws affect the implementation of the practice change requiring written agreements with buyers?

- Written buyer agreements will be required of all MLS participants working with buyers prior to touring a home, unless state law requires a written buyer agreement earlier in time.

What does it mean to tour a home?

- Written buyer agreements are required before a buyer tours a home for sale listed on the MLS.
- Touring a home means when the buyer and/or the MLS participant, or other agent, at the direction of the MLS participant working with the buyer, enter(s) the house. This includes when the MLS participant or other agent, at the direction of the MLS participant, working with the buyer enters the home to provide a live, virtual tour to a buyer not physically present.
- A “home” means a residential property consisting of not less than one nor more than four residential dwelling units.

Does the requirement for a written agreement with buyers mean that MLS participants and buyers must enter into a written agency agreement?

- No. MLS participants and buyers will still be able to enter into any type of professional relationship permitted by state law.
- NAR policy does not dictate:
 - o What type of relationship the professional has with the potential buyer (e.g., agency, non-agency, subagency, transactional, customer).
 - o The term of the agreement (e.g., one day, one month, one house, one zip code).
 - o The services to be provided (e.g., ministerial acts, a certain number of showings, negotiations, presenting offers).
 - o The compensation charged (e.g., \$0, X flat fee, X percent, X hourly rate).

If an MLS participant hosts an open house or provides access to a property, on behalf of the seller only, to an unrepresented buyer, will they be required to enter into a written agreement with those buyers touring the home?

- No. The new rule will cover every type of relationship where an MLS participant is working with a buyer.

Are written buyer agreements required when listing agents talk with a buyer on behalf of a seller only or as subagents of the seller?

- No. If the MLS participant is working only as an agent or subagent of the seller, then the participant is not working for the buyer. In that scenario, an agreement is not required because the participant is performing work for the seller and not the buyer.

Are written buyer agreements required when MLS participants perform ministerial acts?

- Yes. The obligation is triggered once the MLS participant is working with that buyer and has taken them to tour a home, regardless of what other acts the MLS participant performs.
- But an MLS participant performing only ministerial acts — without the expectation of being paid for those acts and who has not taken the buyer to tour a home — is not working for the buyer.

Are written buyer agreements required in a dual agency scenario, when a single agent works both for the seller and for the buyer?

- Yes. If an MLS participant is working as an agent for a buyer, a written agreement is required.

Are written buyer agreements required in a designated agency scenario, when a single broker works both for the seller and for the buyer, and designates an agent to represent the buyer?

- Yes. If an MLS participant is working as an agent for a buyer, a written agreement is required.

MLS participants may not receive compensation for services from any source that exceeds the amount or rate agreed to in the buyer agreement. Does this mean that brokerages can only have one agreement with the buyer?

- No. NAR policy does not dictate:
 - o What type of relationship the professional has with the potential buyer (e.g., agency, non-agency, subagency, transactional, customer).
 - o The term of the agreement (e.g., one day, one month, one house, one zip code).
 - o The services to be provided (e.g., ministerial acts, a certain number of showings, negotiations, presenting offers).
 - o The compensation charged (e.g., \$0, X flat fee, X percent, X hourly rate).
- Compensation continues to be negotiable and should always be negotiated between MLS participants and the buyers with whom they work.

In the buyer agreement, can buyers and buyer brokers agree to a range of compensation?

- NAR policy will not dictate the compensation agreed between buyers and buyer brokers (e.g., \$0, X flat fee, X percent, X hourly rate).
- Under the settlement, any compensation agreed to must be objectively ascertainable and not open-ended. For example, the range cannot be “buyer broker compensation shall be whatever amount the seller is offering to the buyer.”

Should active buyer agreements entered into before the MLS policy change be amended to make sure any compensation is not open-ended and is objectively ascertainable?

- Yes. MLS participants working with a buyer after the effective date of the policy should take steps to ensure that the buyer has agreed to the necessary terms required by the settlement agreement.

Should active buyer agreements entered into before the MLS policy change be amended to remove any provision that authorizes the buyer broker to keep any offers of compensation exceeding the amount of compensation agreed with the buyer?

- Yes. MLS participants working with a buyer after the effective date of the policy should take steps to ensure that the buyer has agreed to the necessary terms required by the settlement agreement.

Should active listing or buyer agreements entered into before the MLS policy change be amended to include a conspicuous disclosure that compensation is not set by law and is fully negotiable?

- MLS participants must make this disclosure, but active agreements do not need to be amended to accomplish this. MLS participants can do a separate disclosure to satisfy the requirement.

Can buyers and buyer brokers rely on an offer of compensation that was on the MLS prior to the effective date of the MLS policy changes?

- If the sales contract is signed before the MLS policy change, the buyer broker should be able to rely upon the offer of compensation even if closing occurs after the date of the policy change.
- But if the sales contract is not signed before the date the participant's MLS implements the policy changes, the offer on the MLS will not be valid and buyers and buyer brokers may wish to protect themselves in writing with the listing broker or seller through a broker agreement or by including the offer of compensation in the sales contract.

Does the settlement agreement's requirement of "objectively ascertainable" and "not open-ended" apply to listing agreements or the compensation sellers pay listing brokers?

- No. Unlike the settlement agreement's requirements that compensation in buyer agreements be objectively ascertainable and not open-ended, listing agreements can be structured however the seller and listing broker agree, so long as the listing agreement complies with the law, pre-existing MLS policy, and "specifies the amount or rate of any payment" from the seller to the listing broker.

Should active listing agreements entered into before the MLS policy change be amended to address the settlement agreement's prohibition on offers of compensation being communicated on the MLS?

- If the listing agreement instructs the listing broker to make an offer of compensation without reference to the MLS, no change to the listing agreement is needed, as the listing broker can comply with that instruction without violating the MLS policy change.
- But if the listing agreement specifies that offers of compensation be made "on the MLS," then the listing broker should work with the seller to amend the listing agreement before the MLS policy change is implemented, to make it clear the listing broker will not make an offer of compensation on the MLS and will not be violating the listing agreement by failing to make an offer of compensation on the MLS.