



LEGAL BULLETIN

Revisions to RCW 18.86

Significant revisions to Washington’s law governing real estate brokerage relationships (RCW 18.86, the “Agency Law”) become effective on January 1, 2024. The revisions, which are set forth in [Senate Bill 5191](#), include:

- Requiring real estate firms to enter into a written brokerage services agreement with a buyer as soon as reasonably practical after commencing real estate brokerage services unless the appointed broker performs real estate brokerage services solely for commercial real estate;
- Changing the term “dual agent” to “limited dual agent” to reflect the limited representation that a broker can provide when representing both the buyer and the seller;
- Requiring specific consent by buyers and sellers to an individual broker acting as a limited dual agent;
- Clarifying that a broker owes certain duties in RCW 18.86.030 to all parties in a transaction;
- Requiring disclosure to all parties of any compensation offered to a firm by another party or another real estate firm; and
- Modernizing the “pamphlet” that brokers must provide to consumers explaining real estate brokerage relationships.

These changes in the law necessitated revisions to several CBA forms, as well as the creation of new forms. “The Law of Agency” pamphlet has been replaced by a new pamphlet, “Real Estate Brokerage in Washington.” Samples of the revised forms and pamphlet are available in the Washington State Agency Law Resources section of CBA’s website and will be published for use in Legal Library Pro on January 1, 2024.

The revisions to the Agency Law apply to both purchase and sale transactions and lease transactions. References in this bulletin to buyers and sellers generally apply to tenants and landlords.

Brief History of Agency Law

The Agency Law was enacted in 1997. Prior to the Agency Law, brokers who worked with buyers were actually “sub-agents” of the seller and therefore owed agency duties to the seller and not the buyer they were working with. The Agency Law presumes that a broker who performs real estate brokerage services for a buyer is an agent of the buyer unless the broker has a written agreement with the seller.

Accordingly, although the Agency Law requires written agreements between real estate firms and sellers, it does not require written agreements with buyers.

Senate Bill 5191 (the “Revised Law”) was passed during the 2023 legislative session. It will take effect on January 1, 2024, and makes several significant changes to the Agency Law, including the requirement that unless a broker performs real estate brokerage services as a buyer’s agent solely for commercial real estate, the broker must enter a written services agreement with buyer. This bulletin describes the changes to the Agency Law and the associated changes to CBA’s library of legal forms.

Changes Affecting Numerous Forms

CBA made certain general changes that impact many forms. First, the terms “Selling Firm,” “Selling Broker,” and “Selling Office Commission” have been replaced by “Buyer Brokerage Firm,” “Buyer Broker,” and “Buyer Brokerage Firm Compensation,” respectively. “Selling Firm” and related terms are remnants of sub-agency, which, as noted above, has not been a feature of the Agency Law since 1996.

Second, buyer brokerage firms’ compensation has been decoupled from the listing firms’ compensation. Previously, a buyer brokerage firm’s compensation was an offer from the listing firm to share its compensation from the seller with the buyer brokerage firm. Now, the listing agreements provide the seller with the option of offering compensation directly to the buyer brokerage firm. Additionally, the new Buyer Brokerage Services Agreement and Tenant Brokerage Services Agreement specify the compensation to be paid to the buyer brokerage firm or tenant brokerage firm by the buyer or tenant. Both of those forms acknowledge that the seller or landlord may (but is not required to) offer compensation to the buyer brokerage firm or tenant brokerage firm. As described below, those forms address what happens if the compensation offered by the seller or landlord differs from the compensation to be paid by the buyer or tenant pursuant to a brokerage services agreement.

Because buyer brokers’ compensation is independent of the listing broker’s compensation, the amount of compensation (if any) to be paid by the seller is a term to be agreed upon by the buyer and seller. Accordingly, the Purchase and Sale Agreement now contains a Specific Term identifying the Buyer Brokerage Firm compensation. Similarly, the lease forms contain new provisions in which the parties specify the compensation (if any) paid to the Tenant’s Brokerage Firm.

The changes described above impacted several forms, not all of which are specifically discussed in this bulletin.

Brokerage Services Agreements

The Revised Law requires brokers to enter a written “brokerage services agreement” with buyers as well as sellers. There is an exception to this requirement for brokers who represent buyers solely in connection with commercial real estate (the

“Commercial Real Estate Exception”). The Commercial Real Estate Exception is described in detail below. Unless that exception applies, a firm must have a services agreement with its client to receive compensation.

The revised Agency Law requires a firm to enter into a services agreement with the firm’s principal “before, or as soon as reasonably practical after, its appointed broker commences rendering real estate brokerage services to, or on behalf of, the principal.” This means that the broker must enter into the services agreement with the principal as soon as the broker reasonably can, taking into account the circumstances of the individual situation. The failure to do so is a violation of license law.

The revised Agency Law requires services agreements to include the following provisions:

- The term of the agreement. For buyers, agreements must have a default term of 60 days.
- The identity of the broker appointed as the agent for the principal.
- Whether the agency relationship is exclusive or non-exclusive. For buyers, agreements must include checkbox options for the type of agency relationship.
- Whether the principal consents to the individual broker acting as a limited dual agent, which consent must be separately initialed by the principal.
- Whether the principal consents to the designated broker and any supervising broker acting as a limited dual agent.

Services agreements must also contain the terms of compensation, including:

- The amount the principal agrees to compensate the firm.
- The principal’s consent, if any, and terms of such consent, to compensation sharing between firms and parties.
- The principal’s consent, if any, and any terms of such consent, to compensation of the firm by more than one party.

Services agreements with buyers must also state whether the appointed broker agrees to show the buyer properties if there is no agreement or offer by any party or firm to pay compensation to the firm for the services provided to the buyer.

Commercial Real Estate

The Revised Law provides that in lieu of a services agreement, a broker rendering real estate brokerage services to a buyer solely for commercial real estate may disclose in writing to the buyer, before the buyer signs an offer with regard to such commercial real estate, the source and amounts of any compensation that the broker has or expects to receive from any party in conjunction with such transaction.

“Commercial real estate” is defined by RCW 60.42.005 to include all real property except: (1) property improved by four or less residential units; (2) unimproved property that may be improved only by four or less residential units; (3) certain farm and

agricultural land and timberland; and (4) improved residential units such as condominiums, townhouses, timeshares, or stand-alone houses in a subdivision that may be sold on a unit-by-unit basis.

CBA has created several new forms to assist brokers in navigating this Commercial Real Estate Exception. As noted above, the applicability of the exception stems from the nature of the real estate acquired by the buyer. No other factor determines whether the exception applies. If the Commercial Real Estate Exception does not apply, a firm must enter a services agreement with its principal before or as soon as reasonably practical after commencing real estate brokerage services. The Notice Regarding Brokerage Services Agreements (Form NRBSA) is a form brokers can provide to clients interested in acquiring commercial real estate. It states that entering a services agreement is optional unless the client decides at a later time to consider acquiring real estate other than commercial real estate, in which case a services agreement will be required.

If a firm has not entered into a services agreement with a buyer of commercial real estate, the buyer broker must disclose in writing to the buyer, before the buyer signs an offer with regard to such commercial real estate, the source and amounts of any compensation that the broker has or expects to receive from any party in conjunction with such transaction. The new Disclosure and Consent (Form DC) can be used to make this disclosure. This form also contains other disclosures and consents required by Washington law, including agency disclosures, consents regarding compensation, and acknowledgment of receipt of the pamphlet, so it can be used in transactions in which the transaction documents do not otherwise contain those required provisions. The new Disclosure and Consent – Leasing form (Form DC-L) is the version of this form that should be used for leasing transactions.

Limited Dual Agency

The Revised Law replaces the term “dual agency” with “limited dual agency” to reflect the reality that a broker representing both the buyer and the seller is limited in the services it can provide to either principal. Like the law prior to the revision, to be a limited dual agent, a broker must have a written consent from both the buyer and the seller. The Revised Law also requires the principal to “separately initial” in the services agreement the principal’s consent to an individual broker acting as a limited dual agent. Additionally, the Revised Law requires a principal to acknowledge that “a limited dual agent may not advocate terms favorable to one principal to the detriment of the other principal and is further limited as set forth in RCW 18.86.060.” CBA’s new Buyer Brokerage Services Agreement, new Tenant Brokerage Services Agreement, and revised listing agreements address these requirements.

The agency relationship with a principal includes the firm’s designated broker and any managing broker responsible for supervising the broker appointed by the firm to be the principal’s agent. As such, in addition to the above requirements related to single agent limited dual agency, the Revised Law provides that “in a transaction in

which different brokers affiliated with the same firm represent different parties, the firm's designated broker, and any managing broker responsible for the supervision of both brokers, is a limited dual agent." The Revised Law requires the principal to consent to the firm's limited dual agency, but unlike single agent limited dual agency, the principal need not separately initial the consent. CBA's new Buyer Brokerage Services Agreement, new Tenant Brokerage Services Agreement, and revised listing agreements address these requirements.

Duties Owed to All Parties

Brokers owe certain duties to all parties in a transaction, including the duties to exercise reasonable skill and care, deal honestly and in good faith, timely present all written offers, disclose all material facts, and account for money received by the broker. (RCW 18.86.030) The Revised Law clarifies that these duties are owed to all parties in the transaction and not just the broker's own client.

Brokers also owe a duty to all parties to disclose who the broker represents. CBA's Commercial & Investment Purchase & Sale Agreement (Form PS_1A) enables brokers to satisfy this duty in the "agency disclosure" provision where brokers identify using check boxes who they represent in a transaction. As described below, the changes to CBA's leasing forms include revisions that enable compliance with this requirement in leasing transactions.

The Revised Law also requires brokers to disclose to all parties "any terms of compensation offered by a party or a real estate firm to a real estate firm representing another party." (RCW 18.86.030(g)(ii)) The revisions noted above to the purchase & sale agreement and lease agreements stemming from the decoupling of listing broker and buyer broker compensation facilitate compliance with this requirement. Additionally, Forms DC and DC-L described above can be used by brokers (a) to disclose any compensation offered by a firm to a firm representing the other party and (b) in transactions in which the parties do not use a CBA purchase & sale agreement or lease form.

Real Estate Brokerage in Washington Pamphlet

The original "Law of Agency" pamphlet was simply a reprinting of the text of RCW 18.86. The Revised Law creates a new pamphlet, "Real Estate Brokerage in Washington," which describes real estate brokerage relationships and legal duties in a way that is more concise and easier for consumers to understand.

Under the Revised Law, brokers must provide the pamphlet to any party to whom the broker renders real estate brokerage services "as soon as reasonably practical but before the party signs a services agreement." Additionally, brokers must "obtain an acknowledgement of receipt by the party." Brokers who represent buyers solely interested in commercial real estate should proceed carefully because although a

written services agreement is not required for such buyers, the buyer must still be provided the pamphlet and the broker must still obtain an acknowledgement of receipt. CBA created the new Pamphlet Acknowledgment (Form PA), which brokers can use to document a party's receipt of the pamphlet.

Additionally, brokers must provide the pamphlet to any party who is not represented by a broker before the party signs an offer or as soon as reasonably practical. Brokers must obtain a receipt acknowledgment from those parties as well.

Buyer Brokerage Services Agreement

The Buyer Brokerage Services Agreement (Form BBSA) replaces both the prior Buyer's Agency Agreement (Form BB-1) and the prior Exclusive Buyer/Tenant Representation and Commission Agreement (Form XBT). Provisions in the Buyer Brokerage Services Agreement related to the Revised Law are:

- The default duration of the term of the agreement is 60 days, as required by the Revised Law. The parties may agree on a different duration of the term.
- There is a provision regarding "limited dual agency," containing initial blocks for a buyer to consent to the individual broker acting as a limited dual agent.
- The provision regarding "scope of agency" enables the parties to choose between an exclusive agency relationship and a non-exclusive agency relationship, with a default of non-exclusive agency.
- A provision regarding "property showings" addresses whether the broker will show properties to the buyer for which there is no offer from the seller to compensate the buyer broker and the buyer has not agreed to compensate the broker.

The compensation provision of the Buyer Brokerage Services Agreement has been substantially revised in light of the decoupling of buyer brokerage firm and listing firm compensation. In Section 5(a), the buyer and the buyer brokerage firm agree to the compensation that the buyer will pay upon the closing of the buyer's purchase of a property.

Section 5(b) provides that the seller may, but is not required to, offer to compensate a buyer broker. It then accounts for different circumstances that may arise depending on the amount of compensation (if any) offered by the seller:

- If the compensation paid by the seller is less than the compensation owed by the buyer, the buyer will pay the difference.
- If the compensation paid by the seller is equal to or greater than the compensation owed by the buyer, no compensation is due from the buyer. If the amount of compensation paid by the seller is greater than the compensation owed by the buyer, the parties can agree that the excess will be paid to the buyer brokerage firm or will be credited to the seller. The parties may also agree on a different arrangement.

Section 6 addresses the buyer's compensation obligation for exclusive and non-exclusive agency relationships. For exclusive agency relationships, the buyer must pay the compensation if the buyer or its affiliate purchases a property within the scope of the agreement during the term of the agreement. For non-exclusive agency relationships, the buyer must pay the compensation if the buyer or its affiliate purchases a property during the term of the agreement that buyer learned about through the efforts of the buyer brokerage firm. For both exclusive and non-exclusive agreements, the buyer owes the compensation if it purchases a property during the "tail period." The default duration of the tail period is 60 days, but the parties can agree to a longer or shorter duration.

Tenant Brokerage Services Agreement

The Tenant Brokerage Services Agreement (Form TBSA) is similar to the Buyer Brokerage Services Agreement. Form TBSA replaces Form XBT. Although not dictated by the revision to the Agency Law, the form provides a variety of compensation options that are unique to leasing transactions. For this reason, there are separate brokerage services agreements for buyers and tenants.

Listing Agreements

The listing agreements for both sale and lease listings (Form XS, Form XL, Form XSL, Form XA, Form XLA, Form XB, and Form XBA) have been revised, including the following:

- Addition of a new provision regarding "limited dual agency," including an initial block for the seller's consent for the listing broker to act as a limited dual agent.
- Consistent with compensation decoupling, listing firm's compensation is delineated separately from compensation offered (if any) by seller to the buyer's broker. For the lease listing agreements, multiple formulas for calculating compensation are presented as choices. The seller is informed that offering compensation to the buyer's broker is not required.
- Seller consents to firm receiving compensation from more than one party and to sharing compensation between firms.
- Like the Tenant Brokerage Services Agreement, the lease listing agreements contain additional options for calculating compensation.

Purchase and Sale Agreements and Lease Agreements

As noted above, the purchase and sale agreements and lease agreements have been revised to reflect that buyer brokers' compensation is a term to be agreed upon between the buyer and seller. Additionally, the purchase and sale agreements and lease agreements now contain buyers broker compensation disclosures that must be provided to buyers of commercial real estate in lieu of a services agreement. Finally, the

consents to dual agency have been removed from the purchase and sale agreements and lease agreements because those consents are required in the services agreements.

The agency disclosure provisions in the lease agreements have been revised to enable compliance with the requirement that brokers disclose to all parties who the broker represents. Additionally, the provisions in the lease agreements concerning the landlord compensation have been revised to reflect the different options for calculating compensation contained in the listing agreements and Tenant Brokerage Services Agreement.

Compensation Disbursement Instructions

Because some or all of the buyer broker's compensation may now be paid by the buyer pursuant to a buyer brokerage services agreement, CBA has created a new form to instruct escrow to make payments to the buyer broker from the buyer. Specifically, a buyer brokerage firm should use the "Compensation Disbursement Form (Buyer Funded)" (Form CDF-B) to direct such payments. Form CDF-B need not be signed by or shared with the seller or listing firm. Existing Form CDF, which provides disbursement instructions for seller-funded compensation, was revised to replace "commission" with "compensation" and replace "Selling Office" and "Selling Firm" with "Buyer Brokerage Firm."

Existing Agency Relationships and Pending Transactions

Listing agreements signed prior to January 1, 2024, should be amended to address the seller's consent to limited dual agency. Firms should use the Amendment to Listing Agreement (Form LE) to do this. The seller should check the applicable box to address consent to limited dual agency for the individual listing broker. Any listing signed on or after January 1, 2024, should use the new listing agreement.

Purchase and sale agreements for transactions pending before January 1, 2024, need not be amended. Purchase and sale agreements written on or after January 1, 2024, should use the new form.

For buyer brokers who have existing agency relationships, brokers should have buyers sign the new services agreement unless the Commercial Real Estate Exception applies and the parties elected not to enter a services agreement. If a broker and a buyer have an existing written agency agreement, the parties should update their agreement on January 1, 2024, using a new form that complies with the Revised Law.

Buyers who are party to an existing purchase and sale agreement that has not yet closed on January 1, 2024, need not sign a services agreement. If such a sale fails, however, and if the Commercial Real Estate Exception does not apply, the parties must enter a services agreement.