

# Wisconsin Real Estate Practice FAQs

## June 28, 2024

These FAQs are intended to provide general information and will be updated on an as-needed basis. The information contained herein is current as of the date of the latest update. Please note that circumstances may change, and while we strive to ensure the accuracy of the information, we make no guarantees regarding its completeness or currentness. For the most up-to-date information, please refer to the appropriate sources or contact us directly.

As a result of the National Association of REALTORS® (NAR) proposed settlement agreement to resolve the nationwide claims brought by home sellers, NAR has agreed to make two practice changes effective August 17, 2024:

1. The Multiple Listing Service (MLS) will no longer include offers of compensation. Most Wisconsin MLSs will remove the compensation field around mid-August, though some may make the change earlier. Therefore, listing firms will no longer be able to offer compensation to cooperating firms via the MLS.
2. Firms working with buyers need a written buyer agreement before touring a home with a buyer.

### **MLS: Offers of compensation and seller concessions**

#### **1. May MLS participants or subscribers use showing platforms to offer compensation?**

No. Compensation may not be offered on the MLS or any other showing platforms, associated documents or other shared tools for REALTORS® created by MLS participants and REALTOR®-owned MLSs. Use of MLS data or data feeds to directly or indirectly establish or maintain a platform of offers of compensation from multiple brokers to buyer brokers or other buyer representatives is prohibited.

#### **2. Can a listing firm still offer compensation to cooperating firms?**

A listing firm can still offer compensation to cooperating firms but cannot use the MLS to do so. A firm can communicate an offer of compensation on its website, on signs, with fliers, social media posts, text messages, emails, telephone or other non-MLS communications.

Once the offer of compensation is no longer on the MLS, a cooperating firm may contact the listing firm to see if there is an offer of compensation, how much is being offered, and what the cooperating firm must do to earn it.

Once an offer of compensation is made by a listing firm, cooperating firms must take some action or enter into a written compensation agreement to accept that offer of compensation and agree upon the standard of performance and other terms and conditions, that is, the information formerly provided by the MLS.

#### **3. Can a firm advertise seller concessions on the MLS?**

If a seller is offering concessions, the firm can advertise that on the MLS if that MLS's rules permit advertising seller concessions. Concessions advertised in the MLS cannot be conditioned on

payment to the buyer's firm. A buyer can use the buyer's offer to purchase to ask the seller to pay the buyer's firm's fee.

#### 4. Can firms enter into compensation agreements with other firms?

Firms can have compensation agreements with other firms, but they will be on a transaction-by-transaction basis. The terms of the NAR proposed settlement agreement require a listing firm to first disclose to a seller what the firm proposes to offer to cooperating firms, and the seller must approve that amount prior to the firm paying or entering into any agreement to pay a cooperating firm.

The firms may use the WRA Compensation Agreement for this purpose. This form is available in Transactions (zipForm Edition) and the WRA PDF Forms Library.

#### 5. May firms enter into standing policy letters or blanket compensation agreements for firm-to-firm compensation?

No. As part of the proposed settlement terms, a listing firm must conspicuously disclose to sellers and obtain seller approval for any payment or offer of payment that the listing firm or seller will make to another firm acting for buyers.

This disclosure and seller approval must be in writing and must be provided in advance of any payment or agreement to pay to another firm acting for buyers and must specify the amount or rate of any such payment. The underlining is added to emphasize the language that disclosure and seller approval of any offer of compensation to be made by the listing firm or the seller must occur prior to any agreement between firms regarding the compensation.

#### 6. What happens to existing policy letters or blanket compensation agreements between firms?

As of August 17, 2024, they will be in violation of the terms of the NAR proposed settlement.

### Buyer relationships in Wisconsin

#### 7. What are an agent's choices for working with a buyer?

When an agent is working with a buyer, the firm and its agents and the buyer will be in pre-agency, the buyer will be a customer, or the buyer will be a client.

- **Pre-agency**

Pre-agency is the time before a buyer has decided whether to be a client or a customer. During pre-agency, the firm and its agents are a neutral provider of information and do not represent either party. During pre-agency, the agent and the buyer can attend showings, but the agent cannot engage in negotiations, such as drafting an offer, of any kind for either party.

If an agent is showing a home to a buyer during pre-agency, the agent will need a written agreement with the buyer.

Once a buyer is ready to engage in negotiations, such as drafting an offer, the agent must have the buyer choose whether to be a customer or a client, marking the end of pre-agency.

An agent in pre-agency cannot negotiate, for example, write an offer, for a buyer.

- **Customer**

If a buyer decides to be a customer, the agent will give the buyer a Disclosure to Customers form. When the buyer is a customer, the agent can draft the offer for a buyer but cannot give

opinions or advice to the buyer that would be counter to the seller's interests. The agent's firm in this scenario is a subagent of the listing firm.

If an agent is showing a home to a customer, where the agent has already provided the Disclosure to Customers form to the buyer, the agent does not need an additional written agreement with the buyer.

- **Client**

If the buyer is a client, the agent and its firm will enter into a WB Buyer Agency Agreement with the buyer.

If an agent is showing a home to a buyer client, the buyer and the firm will already have a WB Buyer Agency Agreement, and the agent does not need an additional written agreement with the buyer.

### 8. Who needs to enter into a written buyer agreement?

MLS participants working with buyers must enter into written agreements with buyers before touring a home. An open house is not considered "touring a home," so an agent hosting an open house will not need to have written agreements with the buyers attending the open house.

Role	Written agreement before touring
Listing agent or subagent	No
Buyer's agent	Yes
Pre-agency (not a listing agent, subagent or buyer's agent)*	Yes

\*As provided in NAR's FAQs.

## WB form modifications

### 9. Which WB forms have been updated?

All listing contracts, all buyer agency and tenant representation agreements, and all offers to purchase, including the option to purchase, have been revised with an optional use date of July 1, 2024, and a mandatory use date of August 15, 2024.

Please refer to the WRA [forms update resource webpage](#) for more information about the modifications to the WB forms. PDFs of these forms are currently available on the [DSPS website](#).

### 10. What are the changes to the WB listing contracts?

Firms can advertise seller concessions if the seller is offering them. The Compensation to Others section includes an affirmative statement that the firm has disclosed, and the seller approves offers of compensation to cooperating firms working with buyers such as subagents and buyer's firms. Functionally, the form still works the same, but additional language to bolster consumer transparency and compliance with the settlement agreement has been incorporated.

### 11. Will current listings need to be amended?

For the most part, existing listing contracts will not need to be amended. The WRA is creating a disclosure form that can be provided to sellers with existing listing contracts to incorporate disclosure language required by the settlement. If an existing listing required a firm to offer

compensation in the MLS, then the listing would need to be amended with a WB-42 Amendment to Listing Contract. The preprinted terms of the WB listings do not require a firm to make an offer of compensation on the MLS, so the majority of listings will not need to be amended.

Once the new listing contracts with the July 1, 2024, optional use date and August 15, 2024, mandatory use date are available, agents can begin using those and this additional disclosure document will not be necessary.

## **12. What are the changes to the WB buyer agency agreements?**

Language was added to clarify that a buyer's firm cannot receive compensation from any source that exceeds the amount agreed to in the buyer agency agreement. If a listing firm happens to be offering compensation that exceeds what the buyer and firm have agreed to, the buyer and the firm may use a WB-47 Amendment to Buyer Agency or Tenant Representation Agreement to amend the compensation amount in the buyer agency agreement to allow the buyer's firm to receive the higher amount. Functionally, the form still works the same, but additional language to bolster consumer transparency and compliance with the settlement agreement has been added, including language that the firm cannot represent its services are free unless no compensation is received, that the specific amount or rate of compensation must be objectively ascertainable and not open-ended, and that commissions are not set by law and are fully negotiable.

## **13. Will existing buyer agency contracts need to be amended?**

For the most part, existing buyer agency agreements will not need to be amended. The WRA is creating a disclosure form that can be provided to buyers with existing buyer agency agreements to incorporate disclosure language required by the settlement.

If, however, an existing buyer agency agreement states the buyer's firm's compensation will be "whatever is offered by the seller or listing firm" or "whatever is offered in the MLS" or in some other language that is open ended, it will need to be amended to state the commission as an amount that is objectively ascertainable. The WB-47 Amendment to Buyer Agency or Tenant Representation Agreement can be used if an amendment is necessary.

Once the new buyer agency agreements with the July 1, 2024, optional use date and August 15, 2024, mandatory use date are available, agents can begin using those, and this additional disclosure document will not be necessary.

## **14. What changed in the WB offers?**

The WB offers will now include an optional provision whereby the buyer may request that the seller pay the buyer's firm compensation.

## **15. Can a buyer, who is represented by a buyer's agent, request that the seller pay the buyer's firm's compensation?**

Yes. A buyer may include a provision in the buyer's offer to purchase asking the seller to pay some or all the buyer's firm's fee. Like any offer to purchase provision, this is negotiable between the buyer and the seller. A seller may use a counter-offer to counter out or modify such a request. All WB offers with a mandatory use date of August 15, 2024, will have an optional provision for a buyer to request that the seller pay the buyer's firm's compensation.

## **16. Can a subagent ask their buyer customer to include a provision in the offer asking the seller to pay a fee to the subagent?**

No. A subagent asking a buyer to include a provision in the offer requesting the seller pay a fee to the subagent would be an example of the subagent putting their interests ahead of the listing firm's client's interests, which is contrary to Wisconsin law.

A subagent is a firm that is engaged by a principal firm to provide brokerage services in a transaction, but that is not associated with the principal firm. Typically, this subagency relationship is when a firm other than the listing firm is negotiating, such as writing an offer, on the listing firm's listing for a buyer who is a customer. A subagent owes the duties to all parties in a transaction and cannot place the subagent's interests ahead of the interests of the principal firm's client, which is usually the seller.

A subagent working with a buyer customer can look to the listing firm to see if the listing firm is offering compensation. Neither the seller nor the buyer is obligated to compensate a subagent working with a buyer customer.

## **Buyer agency practice**

### **17. Do NAR's practice changes require an agent working with a buyer to enter into a buyer agency agreement with the buyer?**

No, NAR's proposed settlement does not require a firm to represent a buyer as a buyer's agent. The settlement requires a written agreement with a buyer before touring a home.

Agency law in Wisconsin has not changed. A licensee may show property as an agent of the seller, a subagent of the listing firm, as a buyer's agent or in pre-agency. If the showing occurs during pre-agency, per NAR's practice change, a written agreement will be required. However, Wisconsin law requires a written buyer agency agreement if the buyer is going to be provided client services.

### **18. Must a firm use a written buyer agency agreement to create buyer agency with a buyer client?**

Yes, in Wisconsin, a client is a party to a transaction who has an agency agreement with a firm for brokerage services, and a buyer agency agreement must be in writing.

## **Arbitration/procuring cause**

### **19. If there is no longer an MLS offer of compensation, is a REALTOR® still required to arbitrate?**

Yes. The duty to arbitrate is based on Article 17 of the REALTOR® Code of Ethics.

### **20. Will the associations still provide arbitration services?**

Yes. The duty to arbitrate based on Article 17 of the Code of Ethics remains in place, as do the professional standards services of member boards.

### **21. How can a REALTOR® arbitrate if there is no longer an MLS offer of compensation?**

The duty to arbitrate remains. The difference will be on the basis of the claim for compensation since the offer of compensation will no longer be through the MLS.

### **22. Does procuring cause become obsolete?**

No. Procuring cause may still be negotiated as the standard of performance to earn an offer of compensation from a firm. Procuring cause is not the automatic standard of performance, however, and listing firms making an offer of compensation to cooperating firms will want to consider what standard of performance they will use. Cooperating firms seeking to earn a listing firm's offer of compensation will need to ask the listing firm what the standard of performance is to earn the offer of compensation.

## Resources

For information relating to the NAR lawsuit and settlement agreement, visit the WRA [antitrust resources webpage](#) to find both WRA and NAR resources. See NAR's webpage titled [The Facts for REALTORS®](#) for the latest version of the NAR FAQs, a copy of the proposed settlement agreement and other resources.