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# Legal Update

A WRA Publication Exclusively for the Designated REALTOR®

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## Running a Real Estate Office

With spring soon upon us, now is a good time for office managers to make sure that all management functions are in place to facilitate success for the agents in the office. One of the first fundamental objectives for an office foundation is to make sure that all agents are properly established (from an office function and tax standpoint) as independent contractors or employees, that personal assistants are properly established as either licensed or unlicensed assistants, and that the proper structure is in place for other office staff.

Once these personnel determinations have been made, the broker should choose the appropriate contracts to be used as office personnel are hired. The salespersons' contracts will typically cover compensation, real estate licensing requirements, board memberships, compliance with applicable laws and rules and termination provisions. Because a broker's supervisory responsibilities are extensive, brokers are required by Wis. Admin. Code § RL 17.08 to develop an office policy manual to establish office rules and procedures for handling listing contracts, offers to purchase, leases and other real estate documents. It is also recommended that the manual also cover office conduct, advertising, commissions, buyer brokerage, selling procedures, closings, education, use of forms and other issues.

This *Legal Update* examines the differences between independent contractor versus employee staff, and the requirements for establishing independent contractor status under federal and

state tax law. The use of licensed and unlicensed personal assistants is also reviewed, as well as The broker's supervision duties for office management. In addition, general office practice considerations such as agent terminations and office policy manuals are discussed. The *Update* concludes with pertinent questions and answers from the Wisconsin REALTORS® Association Legal Hotline.

### Real Estate Personnel

Real estate agents, personal assistants and office support staff will be classified as employees or an independent contractors in terms of their authority to act independently and for various tax purposes.

The relationship between the broker and his or her salespersons can be either an independent contractor relationship or an employer/employee relationship. Independent contractors, in turn, can be either common-law independent contractors or statutory independent contractors.

The determination of whether an individual is an employee or independent contractor is important for several reasons. Federal and state income tax is generally withheld from wages paid to employees, but not from compensation paid to independent contractors. The employee/independent contractor status also determines Social Security and Medicare payments, federal and Wisconsin unemployment compensation, Wisconsin worker's compensation, tax on self-employment income and the deductibility of business

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expenses. Failure to comply with these tax responsibilities or the misclassification of an employee as an independent contractor can result in the assessment of back taxes, interest and penalties against the broker's company and/or the broker. Thus, it is important that a broker's staff is correctly classified

### Employees

Employees are individuals who perform services subject to the will and control of an employer who has the legal right to control both the method used and results of the services performed. In Wisconsin, only a very few licensed agents are employees. Secretarial staff, receptionists and unlicensed personal assistants, on the other hand, generally are employees. Employment contracts are not required for employees such as office staff.

The employer is responsible for withholding state and federal income taxes and the employee's share of FICA – Social Security payments and Medicare contributions – from all wages, bonuses and commissions paid to an employee. The employer alone is responsible for paying federal unemployment tax; the employee makes no contribution.

Social Security taxes provide benefits for retired workers, the disabled and the dependents of both. The Medicare tax is used to provide medical benefits for certain individuals when they reach age 65. Workers, retired workers, and the spouses of workers and retired workers are eligible to receive Medicare benefits upon reaching age 65. Federal income taxes are used to provide for national programs such as defense, community development and law enforcement.

Employees complete Internal Revenue Service Form W-4 so the employer can calculate how much money to withhold from employee wages. Income tax is determined using the withholding tables in the *IRS Circular E – Employer's Tax Guide*. For Social

Security, the employer withholds 6.2 percent of the employee's wages and matches that amount – a total of 12.4 percent. The employer also matches the employee's 1.45 percent Medicare – a total of 2.9 percent. And the employer must pay federal unemployment tax, which is 0.8 percent of the first \$7,000 of the employee's wages, or \$56.

The employer must deposit the amounts withheld from employees and the employer's contribution to a designated bank account on a regular schedule – usually monthly. The IRS will supply Federal Tax Deposit coupons showing the employer's Employer Identification Number for making deposits. Wisconsin also requires regular deposits of state income tax payments that were withheld.

### Independent Contractors

Independent contractors are persons who engage in an independent trade, business or profession in which they offer their services to the general public. The general rule is that an individual is an independent contractor if the employer has the right to control or direct only the result of the work and not the means and methods of accomplishing the result. Many Wisconsin real estate agents fall within this classification.

An individual's status as an employee or independent contractor may be determined under common-law rules. Under the common-law test, an individual is an employee if the person for whom the individual performs services has the right to control and direct that individual, not only as to the result to be accomplished, but also as to the means by which that result is accomplished. The most important factor is the degree of control. To help determine whether an individual is an employee or an independent contractor under the common-law rules, the IRS identifies 20 factors

that are used as guidelines on a case-by-case basis to determine whether sufficient control is present to establish an employer/employee relationship. See IRS Publication 15-A, *Employer's Supplemental Tax Guide*, online at [www.irs.gov/pub/irs-pdf/p15a.pdf](http://www.irs.gov/pub/irs-pdf/p15a.pdf), for further discussion.

### **Maintaining Common-Law Independent Contractor Status**

The 20-factor common-law test limits the requirements that a broker/company may place upon its sales associates. For example, under the 20-factor test, a common-law independent contractor generally should not be subjected to mandatory floor time, required meetings, or property tours, dress codes, performance standards or other mandatory guidelines controlling the manner in which the agent performs his or her job. A statutory independent contractor generally may be made subject to these requirements. All independent contractors, however, can be required to attend training sessions pertaining to real estate laws, regulations and ethical rules because the agent's failure to conform his or her practice to these principles can result in liability to the broker.

To maintain the common-law independent contractor status, the broker should consider the following:

1. Independent contractors should buy their own business cards, and the use of desks, telephones and other office equipment should be optional. Independent contractors should provide and pay for automobiles, car maintenance and insurance. The broker can, however, require specified levels of automobile insurance coverage.
2. Common-law independent contractors should pay their own license fees and local board, WRA and National Association of REALTORS® dues.
3. Common-law independent contractors are entitled only to the compensation stated in their agreement

with the broker and should be paid only commissions. Salaries, draw accounts, and advances have been recognized as inconsistent with independent contractor status.

4. A common-law independent contractor can be required to follow the policies and procedures in an office policy manual only to the extent that the manual sets forth procedures and requirements the broker and his or her company are legally obliged to follow. Detailed rules of conduct, for example a mandatory dress code, are only optional suggestions and recommendations.
5. The broker can require the use of approved business forms by all salespeople.
6. Floor time, sales meetings and weekly open house caravan tours should be optional for independent contractors.
7. The broker should not require mandatory office routine and sales technique training programs.
8. The broker should not set minimum earning requirements or quotas.
9. The role of a manager is generally inconsistent with a broker's need to maintain a lack of control over independent contractors. Managers generally are employees with respect to managerial activities that are subject to the control of the owner, but may also be independent contractors to the extent that they engage in sales activities.

Failure to observe all of these guidelines does not mean that the sales force will automatically become employees, but each failure to observe these principles may contribute to an overall picture of a broker who is controlling the means and manner of job performance, and may lead to the conclusion that the salespeople are employees.

### **Statutory Independent Contractors**

Rather than evaluate the status of real estate agents under the common-law principles, brokers can take advantage

of the simplicity and certainty of the statutory independent contractor classification. Real estate agents may qualify as statutory independent contractors under § 3508(B) of the Internal Revenue Code for federal tax purposes if they meet the following three criteria: licensure, compensation based on sales or output, and a written agreement with the person for whom the service is performed.

The tax code actually refers to statutory nonemployees instead of statutory independent contractors.

Statutory nonemployees include licensed real estate agents and individuals engaged in appraisal activities for real estate sales if they earn income based on sales or other output. Licensed real estate agents are treated as self-employed for all federal tax purposes, including income and employment taxes, if:

- Substantially all payments for their services as real estate agents are directly related to sales or other output, rather than to the number of hours worked, and
- Their services are performed under a written contract providing that they will not be treated as employees for federal tax purposes.

For statutory independent contractor status, the services performed as a real estate agent must be those activities generally associated with the sale of real property. Such services include appraising property; advertising and showing property; closing sales; leasing property, and recruiting, training and supervising other agents. Services performed as a real estate agent do not include the management of property for these purposes. If there is no written agreement between the broker and the salespersons, brokers must continue to observe the more restrictive common-law test to qualify their personnel for independent contractor status.

## Independent Contractor Agreements

Broker-employers can use independent contractor written agreements, such as the WRA Real Estate Independent Contractor Agreement, to qualify their licensed salespersons as statutory independent contractors for federal and Wisconsin tax purposes. The agreement should specify that the agent will not be treated as an employee for federal tax purposes, and that substantially all of the agent's compensation should be commissions earned for providing real estate services. If there is no written agreement between the broker-employer and the salespersons, brokers/companies must observe the more restrictive common-law test to qualify their salespersons for independent contractor status for Wisconsin tax purposes.

Prudent practice also would dictate a written independent contractor agreement as evidence of the agreement regarding commission fees and rates in the event that a dispute later arises, for example, when an agent leaves an office with pending transactions. A written agreement that is signed when the business relationship is commenced will alleviate disputes upon termination of the relationship.

🔑 Every REALTOR® broker/office should have independent contractor agreements with all licensed salespersons and brokers affiliated with the company to clarify their status as independent contractors for income tax purposes. Each agreement should specify that the agent will not be treated as an employee for federal tax purposes, and that substantially all of the agent's compensation should be commissions earned for providing real estate services.

Qualifying agents as statutory independent contractors will eliminate the uncertainty of the employee/independent contractor status for real estate agents and brokers

who would otherwise be subject to the 20-factor common-law test.

For individual tax purposes, independent contractors are treated as self-employed and must file and pay quarterly estimated income tax payments. Income from real estate practice can vary a great deal depending on the market, making it difficult to predict annual tax liability. If estimated tax payments are not made, the tax liability and underpayment interest due when filing an income tax return may be sizable.

## Personal Assistants

If a personal assistant is an employee, then the agent hiring the assistant will be the employer responsible for the same tax withholding that other employees receive: federal income tax, FICA (Social Security and Medicare), FUTA (federal unemployment compensation), state income tax and state unemployment compensation.

If all of this sounds too overwhelming, the agent may have some options. The real estate company's accounting department may handle the paperwork for agents for a small fee. Another option is to hire an assistant through a temporary personnel agency; then it becomes the agency's responsibility to handle payroll and withholding. Or, consider outsourcing this activity to an accountant or a company specializing in payroll administration.

If the assistant is hired as an independent contractor, the assistant is responsible for his or her tax obligations. The broker's only obligation is to prepare an annual 1099 form showing all monies paid to the assistant and give copies to the IRS and the assistant.

Generally, an assistant will be considered an employee if the agent retains the right to control what the assistant does and how it is done. Since the need for an assistant derives from a salesperson's excessive workload and

the assistant's activities will directly impact the salesperson's work, the salesperson may want to retain a significant amount of control over the assistant's actions. Because of the nature of the job to be performed, more than likely an unlicensed assistant should be treated as an employee.

## Determining a Personal Assistant's Tax Status

Because most real estate professionals work as independent contractors, it is tempting to put an assistant in the same category. However, the issue is more complicated for personal assistants. Real estate practitioners are classified as "statutory non-employees" by the IRS if they meet three criteria – licensure, compensation based on sales or output, and a written agreement with the person for whom the service is performed.

Many practitioners wrongly assume that personal assistants who hold real estate licenses are automatically independent contractors. But since they do not contract directly with clients and, in some cases, do not receive compensation based solely on output, they may not meet these statutory requirements. To determine if an assistant can be classified as an independent contractor, use these criteria from the IRS.

An assistant is probably an *employee* if the answer is "yes" to any of the following questions:

- Is the worker required to comply with instructions about when, where and how to perform work?
- Is training provided to the worker?
- Are the worker's services integrated into general business operations?
- Must the worker render the service personally?
- Does the person for whom the work is performed hire, supervise and pay other people to assist the person with work?
- Are there set work hours?

- Does the worker have a continuing relationship with the person for whom the work is performed?
- Must the worker devote substantially full time (what is customarily considered full time in the business and the area) to the work?
- Is the work performed on the employer's premises?
- Must the worker perform services in a set sequence?
- Must oral or written reports be submitted regularly to the person for whom the work is performed?
- Is the worker paid by the hour, week or month?
- Are the worker's travel and business expenses paid for?
- Does the person for whom the work is performed supply the tools, materials and equipment needed to perform the work?
- Can the worker be discharged at will?
- Can the worker terminate the relationship without incurring liability?

If the answer is "yes" to any of these four questions, it's a good indication that the assistant may be an *independent contractor*.

- Does the worker invest in facilities used to perform the work, such as an office?
- Can the worker realize both profit and loss?
- Can the worker work for more than one company at a time?
- Can the worker make services available to the general public?

An assistant may be compensated with an hourly wage, a salary, a salary plus bonus or a commission (must be a licensed personal assistant to receive commission).

### Unlicensed Personal Assistants

An unlicensed personal assistant generally will be classified as an employee and may be paid an hourly wage.

Compensation based on success or sales, such as commission or bonuses, may be deemed illegal referral or finder's fees or illegal fee splitting with a non-licensee. These arrangements would violate Wis. Stat. § 452.19, which permits fee splitting only with other licensees.

### Written Agreement Required for Unlicensed Assistants

Wis. Admin. Code § RL 17.12(1) states, "A real estate salesperson or broker-employee, prior to employing an unlicensed personal assistant, shall enter into a written agreement with his or her broker-employer, setting forth the duties of the unlicensed personal assistant, the manner in which the personal assistant will be compensated for his or her services and the responsibilities between the salesperson or broker-employee and broker-employer for supervision of the personal assistant's activities."

The WRA has developed a form agreement to be used to comply with this rule. Once completed, the form will allow the broker to ensure that:

1. The activities being performed by the personal assistant are appropriate.
2. That the assistant is being paid in a manner that is consistent with state and federal law.
3. That the activities of the personal assistant are being properly supervised to ensure that any potential problems are avoided.

The form agreement provides a useful checklist of duties a personal assistant might perform for the salesperson and provides a vehicle for documenting how the personal assistant will be compensated and supervised.

### Open House Rule

Wis. Admin. Code § RL 17.12(2) refers to open house regulations: "An unlicensed personal assistant may not assist a licensee at an open house for the sale of real estate or a business without the direct, on-premises supervision

and presence of a real estate licensee, and may not provide any services at an open house for which a license under ch. 452, Stats., is required. *Note: This rule does not prevent an owner from holding an open house for his or her own residence, or a non-compensated person, such as a relative or neighbor, from showing or holding an open house on the owner's behalf.*"

Per this rule, an unlicensed personal assistant or secretary would need to have onsite supervision by the broker or another real estate licensee for a development that included real estate and construction sales. If the secretarial services were completely limited to providing information about construction contracts for a builder, broker supervision would not be necessary. However, an unlicensed person could host a broker-only open house. § RL 17.02(3m) defines an "open house" as a showing of real estate open to the public for viewing without an individual appointment. A broker open house is not open to the public.

### Licensed Personal Assistants

All of the concerns associated with hiring an unlicensed assistant may be eliminated if the salesperson hires a personal assistant who holds a real estate license. Using a licensed assistant, however, raises different considerations. Wis. Admin. Code § RL 17.03(2) prohibits licensees who are employed by broker-employers from hiring another licensee to work for them. Thus, the licensed personal assistant must be hired by the broker-employer.

Second, if the licensed assistant is to engage in any licensed activities, local board and MLS rules generally will require that dues and fees be paid with respect to this licensed personal assistant in the same manner in which they are paid for licensed salespeople. These assistants may be employees for purposes of tax law. Therefore, any cost-effective benefits

anticipated to be achieved through the use of a licensed assistant must be evaluated in light of any potential additional dues and payroll costs.

The WRA has developed a Licensed Personal Assistant Agreement. The Licensed Personal Assistant Agreement is not required by the rules, but a written agreement setting forth the parameters of the relationship is certainly beneficial and recommended. A licensed personal assistant who is licensed under the agent's company may show properties, write offers, etc., subject to the limits of the arrangement set forth in the agreement.

## Broker Administrative Responsibilities

The classification of personnel for tax purposes is not necessarily the same as the classification used for unemployment insurance and worker's compensation.

## Unemployment Insurance

The unemployment insurance (UI) program provides weekly benefits to eligible unemployed workers. These benefits provide economic stability to the workers and their families during temporary periods of unemployment and help lessen the effect of unemployment on the local economy. The program is financed solely through employer contributions (taxes). It is not operated as a part of the federal Social Security system, the state worker's compensation program or any federal or state welfare program.

Unemployment insurance is really a payroll tax and not insurance. UI is a federal-state program financed jointly through federal and state employer payroll taxes. The federal unemployment tax is used for administrative expenses and federal extended benefits costs. Wisconsin employer payroll taxes are used to pay benefits to unemployed workers.

Under Wisconsin UI law, the definition of "employee" is quite broad. More people are found to be employees and thus eligible for UI coverage.

Under UI law, a nine-factor test is used to determine who is an independent contractor. Note that this is the same test used for establishing independent contractor status under worker's compensation law.

Under this test, the individual must hold or apply for an employer identification number, or file federal business or self-employment income tax returns. The individual must also meet six or more of the following eight conditions relating to an individual's control over his or her business and/or the services performed:

1. The individual maintains a separate business with his or her own office, equipment, materials and other facilities.
2. The individual operates under contracts to perform specific services for specific amounts of money, and he or she controls the means and methods of performing those services.
3. The individual incurs the main

expenses related to the services that he or she performs.

4. The individual is responsible for the satisfactory completion of the services he or she contracts to perform and is liable for a failure to do so.
5. The individual receives compensation for services performed only on a commission, per-job or competitive bid basis.
6. The individual may realize a profit or suffer a loss under contracts to perform services.
7. The individual has recurring business liabilities or obligations.
8. The success or failure of the individual's business depends on the relationship of business receipts to expenditures.

Brokers, however, are generally not legally required to pay Wisconsin UI contributions for their real estate agents. An UI law exemption for services provided by a real estate agent or salesperson who is paid solely by commission for his or her services will make real estate agents exempt. This exemption is stated in Wis. Stat. § 108.02(15)(k)7.

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☞ REALTOR® brokers/offices should compensate their real estate agents solely by commission in order to remain exempt from UI contributions.

## Worker's Compensation

Wisconsin employers that meet specific requirements are required to carry workers' compensation insurance unless they qualify for self-insured status. Employers receive the assurance they will not be sued for damages, medical care and lost wages if their employees get injured while working. If employees get hurt on the job, employers can direct them to their insurance company's workers' compensation system for quality medical attention, prompt payment of benefits and an early return to work.

The Wisconsin Department of Workforce Development has consistently ruled that real estate salespersons licensed to work for licensed brokers are employees of the broker under the Wisconsin Worker's Compensation Act for the following reasons:

The Wis. Stat. § 452.01(7) defines a real estate salesperson as "any person other than a broker who is employed by a broker to perform any act authorized by Chapter 452 to be performed by a broker." Wis. Stat. § 452.12(3) provides that, "each broker is responsible for the acts of any brokers, salespersons or time-share salespersons employed by the broker." All licensed real estate salespersons are required to work for a licensed broker. The broker-employer is required to: 1) supervise its salespersons and brokers; 2) provide operating procedures for all documents relating to transactions; and 3) be responsible for the preparation, custody, safety and corrections of entries to control the documents. These requirements demonstrate the right to control the details of the work – the key test of an employment relationship. Since the broker is responsible for the brokerage ser-

vices provided by the salesperson, the employer/employee relationship is clearly established. Therefore, real estate salespersons licensed to work for licensed brokers are employees of the broker under the Wisconsin Worker's Compensation Act. The DWD has also taken the position that licensed brokers who work for real estate brokers/companies are similarly situated, and thus also employees for purposes of workers' compensation law.

An employer becomes subject to the Wisconsin Worker's Compensation Act under Wis. Stat. § 102.04(1) and must carry a worker's compensation insurance policy when that employee:

- Usually employs three or more persons full or part time for services performed in Wisconsin. (This employer needs insurance immediately.); or
- Employs one or more full-time or part-time employees and has paid gross combined wages of \$500 or more in any calendar quarter for work done in Wisconsin. This employer must have insurance by the tenth day of the first month of the next calendar quarter.

Generally, real estate brokers, real estate salespersons, personal assistants and office staff all are found to be employees. Under Wis. Stat. § 102.07(4), all helpers and assistants of "employees" are classified as employees for purposes of worker's compensation, provided they are hired with the knowledge of the employer. Accordingly, a broker/company is generally responsible for maintaining worker's compensation insurance for all personal assistants who are hired by the broker or by the broker's agents.

Wis. Stat. § 102.16(3) provides that no employer may solicit, receive or collect any money from employees or any other persons (including real estate licensees and assistants), or make any direct or indirect deduction from their compensation for the purpose of paying any worker's

compensation premiums or liability, or recovering workers compensation premiums that the employer has paid. The DWD has jurisdiction to order the employer to reimburse employees for any premiums deducted from wages. Likewise, any agreement by an employee to waive the right to any compensation for the purpose of covering worker's compensation insurance premiums is invalid.

### **What happens if an office doesn't have workers compensation for salespersons?**

If there is a policy in place for the clerical staff but not the sales associates and an associate is injured during the course of his or her work and while under the direction and control of the broker-employer, the cost may be absorbed by the broker-employer or the associate. Medical insurance typically would not pay for a work-related injury. If the injury is reported to the worker's compensation insurance carrier, the carrier may pay for the injury even though the associate was not specifically covered by the policy. The carrier may then go back and try to collect the premiums the employer-broker should have been paying based upon the presumption that all associates are employees for purposes of worker's compensation.

### **What are the DWD penalty provisions?**

A small firm with no worker's compensation insurance coverage could go bankrupt if a serious injury were sustained. If a salesperson is seriously injured, for example, during a showing or while driving prospects to a showing, and the salesperson files a worker's compensation claim, the DWD will assess penalties.

Wis. Stat. § 102.82 (1) provides that an uninsured employer shall reimburse the department for any payment made to an employee of the uninsured employer from the uninsured employer's fund. The fund is supported by fines collected from employers found in violation of the worker's compensation law.

Wis. Stat. § 102.82(2)(a) provides that all uninsured employers shall pay the DWD twice the amount determined by the department to equal what the uninsured employer would have paid during periods of illegal nonpayment for worker's compensation insurance in the preceding three-year period based on the employer's payroll and commissions paid in the preceding three years. Payment is due within 30 days after the date on which the employer is notified. Interest shall accrue on amounts not paid when due at the rate of 1 percent per month. Actions to recover payment can be brought in circuit court under this section and could amount to tens of thousands of dollars.

☞ Real estate brokers/companies must carry worker's compensation insurance for the salespersons in their firm and for persons with broker's licenses working in the firm. Real estate brokers/companies attempting to rely upon the nine-condition independent contractor exemption test should do so cautiously and only upon the advice of legal counsel.

More information may be obtained from the DWD's Worker's Compensation Division at 608-266-1340, fax: 608-267-0394 or [www.dwd.state.wi.us/wc/](http://www.dwd.state.wi.us/wc/). You may also wish to speak with your insurance representative. Contact the WRA at 608-241-2047 for information about the Wisconsin REALTORS® Dividend Plan, a group worker's compensation plan that provides high-dividend returns on worker's compensation premiums.

## Broker Supervision

Once the broker has selected an office staff and the appropriate independent contractor agreements and employment contracts, the broker must address his or her staff supervisory responsibilities. With respect to licensed staff members, license law estab-

lishes several supervisory obligations on the part of the broker-employer.

A broker-employer shall supervise the activities of any licensee employed by the broker-employer. Wis. Admin. Code § RL 17.08 is entitled "Supervision of "employees," and it requires a broker-employer to supervise the activities of any licensee employed by the broker-employer. Supervision includes, but is not limited to:

- Providing timely, reasonable review of documents in the transaction file. The supervising broker must conduct the review prior to the closing of the transaction.
- Providing salespeople with written procedures for handling listing contracts, offers to purchase and other documents relating to transactions.
- Providing all licensees reasonable access to a supervising broker for purposes of consultation regarding real estate practice issues. Agents must have someone to turn to when they need answers to practice questions.
- Notifying all salespeople where a copy of the Department of Regulation and Licensing rules can be found. The DRL *Code Book* is located online at [www.wra.org/Legal/index.asp?](http://www.wra.org/Legal/index.asp?)
- Identifying those brokers who are supervising agents and the agents being supervised by those brokers in writing.

Broker duties also include checking the licensing status of licensed salespeople and monitoring the transfers and terminations of licensed staff.

## Delegation of Supervisory Roles

The broker supervision rules provide the framework under which a real estate company may assign or delegate its supervision duties to individuals holding broker licenses.

A broker-employer may delegate the duty to supervise licensed employees to one or more supervising brokers. A broker-employer may delegate differ-

ent elements of the supervisory duties for licensees employed by the broker-employer to more than one supervising broker. For example, a company may assign one broker located at company headquarters the duty of reviewing all contracts and other file documents for the entire company. Other brokers may be assigned as the contact for agents working in a certain geographical area, including those working in a branch office, in satellite offices or from home. The key is flexibility. As company "office" structures become more fluid and flexible, companies will have the needed flexibility to address the various "office" models used in the industry.

Delegation must be in writing and signed by or on behalf of the delegating broker-employer, identify the duty delegated, and be signed by the supervising broker to whom the delegation is made. The ultimate goal is to clearly identify which broker is responsible for supervising the services conducted by any individual agent.

There is no standard form for written delegation of supervisory duties. Ultimately, the document used to identify the supervising brokers, their duties and the agents being supervised will be signed by someone on behalf of the company and by the supervising broker. In many companies the form will be structured as a list of agents assigned to an office location. The form will identify the supervising broker for that location. Once signed by a company representative and the supervising broker, it could be filed away; of course the agents in that location should be notified if the content of the form varies from information previously provided to those agents. In other companies where things are a bit less traditional, a spreadsheet with the company roster and columns identifying the names of the brokers assigned to review contracts, answer practice questions and perform other



duties may be prepared. Again the form needs to be signed on behalf of the company and all of the individuals named as supervising brokers.

### **No More Branch Office Rules**

The definition of "branch office" was deleted from Wis. Admin. Code Chapter RL 17, and the requirement for direct, full-time supervision by a broker at each branch was deleted from Wis. Stat. § 452.12(3)(b). Thus, brokers are no longer required to have a full-time broker/manager at each of their branch offices. On-site supervision at branch offices is not required.

However, a broker is required to have adequate supervision of all licensees, regardless of the office location or office configuration model used by the company. Companies must ensure that agents have reasonable access to a supervising broker to consult on real estate practice issues. It is never proper to leave agents "on their own" without any ability to consult with their supervisor. Agents must have someone to turn to when they need answers to practice questions.

Brokers should confer with their attorneys and implement procedures to ensure sufficient supervision, guidance and communication for all business locations.

### **Working for More Than One Brokerage**

Occasionally, a licensee may want to work for two different companies, perhaps because the companies engage in different types of real estate practice. For example, one company may engage in residential sales, and another company may focus on property management. Wis. Admin. Code § RL 17.03 gives guidelines that make it clear that a salesperson's license only allows the salesperson to practice real estate when employed by a broker. Since § RL 17.03(3) states that a salesperson can be employed by only one bro-

ker-employer at one time, a salesperson can only work for one company.

The rules are different for someone with a broker's license, since that person can practice as a broker without being employed by another broker. § RL 17.03(1) states that a broker who is employed by a broker-employer may also engage in real estate practice in his or her own name if the broker obtains written approval from the broker-employer and avoids conflicts of interest with his or her employment by the broker-employer.

### **Supervision of Teams**

Agents cannot personally employ licensed persons to engage in real estate practice. Companies employ these licensees and must supervise them, even if they are assigned to a "team." All "team members" and personal assistants providing licensed services must be supervised by a broker designated by the company. The broker supervision rules allow a company to delegate these supervisory duties to the team leader (if he or she has a broker's license), but the company remains liable for any damages arising from the brokerage services provided by these team members. The question brokers must ask themselves is whether or not it is prudent to delegate supervision of a team to a team leader.

### **Checking Licensee Status**

Wis. Admin. Code § RL 17.07 requires the broker-employer to confirm that current licenses are held by the company's licensed salespeople prior to initial employment of a salesperson and at the beginning of each biennial licensure period. § RL 17.07 also provides that the broker-employer may not employ an unlicensed sales agent. Thus, licensees failing to complete their continuing education requirements and renew their licenses on a timely basis may find themselves without employment until the license renewal process is completed. Failure to ensure that

every agent has renewed his or her license before allowing the agent to continue to practice real estate on behalf of the broker is a common source of discipline by the DRL.

### **Independent Practice**

When an individual has a broker's license and is working as a broker/salesperson under a broker-employer, § RL 17.03(1) permits the broker/salesperson to conduct some independent practice. To practice independently under this rule, the broker/salesperson must have the written consent of the employing broker and must avoid conflicts of interest. In addition, the broker/salesperson may not employ other licensees in this independent practice. Care must be taken, however, that all of the other normal aspects of a brokerage, such as establishing a trust account and observing disclosure duties, are present. The broker-employer should have no responsibility for the independent practice if the broker/salesperson establishes his or her individual operations as clearly independent, similar to the way in which salespersons engaging in personal real estate transactions distance these transactions from the company's business.

**A broker owns and operates a rental management corporation. Can the broker work for another broker-employer and sell real estate and still be the designated broker for her corporation? Can the corporation have licensed employees?**

The broker can continue to operate her rental management corporation as an independent practice provided she follows the rules specified in § RL 17.03(1). The DRL interprets this rule to permit an individual licensed as a broker and employed as a broker/salesperson by another broker-employer to have an independent practice conducted as a corporation where the broker/salesperson is a corporate officer, the designated broker and the only licensee. The rental management corporation can employ only

non-licensed personnel who can show rental property, accept applications, give basic information to prospective tenants, and accept and receipt rental deposit checks. Any negotiations of lease terms or execution of leases must be performed by the broker/officer.

## **Licensee Terminations and Transfers**

When an agent is terminated from a brokerage firm, several issues often arise concerning the rights, duties and obligations of the broker and the agent. Brokers need to be aware of termination issues and anticipate those problems at the beginning of the agency relationship. Advance preparation and the creation of a clear and concise agreement addressing termination issues can save time, money and stress for the broker and agent alike, as well as help to avoid many disputes, hard feelings and even civil litigation. The following is a sampling of the type of issues that a broker should consider prior to any agent termination.

### **Commissions for Pending Transactions**

Wisconsin real estate statutes and administrative rules do not address commission policies between a broker-employer and a real estate agent. Rather, the broker's commission payment obligation after agent termination will usually depend upon the terms and conditions of the independent contractor agreement or office policy. The WRA independent contractor agreement (WRA-ICA) provides a staggered percentage of compensation depending upon the amount of work completed before termination. The contract provides:

- A. Offer accepted and all contingencies removed, X percent
- B. Offer accepted with contingencies to be removed, X percent
- C. Offer received but not accepted, X percent

If there is no written agreement or policies and procedures in place, then past practice of the brokerage firm or the prevailing industry practice may be the standard used to determine compensation. If the parties cannot agree on the amount of commission owed, the parties can agree to voluntarily arbitrate the matter pursuant to Article 17 of the REALTOR® Code of Ethics. If arbitration is not a viable option, the matter may be resolved in circuit court.

Brokers should be aware that an agent without an independent contractor agreement can attempt to collect commissions after termination by filing a claim under the Wisconsin Minimum Wage Law. The Equal Rights Division of the DWD analyzes the employment relationship to determine if the agent was an employee or an independent contractor. The DWD applies a stiff, case-by-case, common-law test to determine whether the agent is truly an independent contractor. The DWD evaluates factors such as whether the agent provides services for more than one employer or company, sets his or her own hours of work and uses his or her own tools, and whether the details of the work performed are controlled by the employer.

If the DWD determines the agent is an employee and not an independent contractor, it may investigate and collect any commissions or wages due to the agent. Brokers who do not use independent contractor agreements and written office policy manuals addressing commissions after termination are urged to do so if they wish to avoid investigation by the DWD and potential prosecution and penalties.

### **Listings**

The listing contract is between the seller and the broker, and when an agent signs a listing contract, it is done on behalf of the broker. As a result, when an agent leaves a brokerage firm, the listing remains with the firm. The listing agent's departure does not ter-

minate the listing or permit the agent to take the listing with him or her.

Arguably, an agent has the right to inform clients and customers that he or she is no longer affiliated with the brokerage firm, provided the notification is done in a manner that does not wrongfully interfere with the agency relationship established between the broker and the client or customer. Standard of Practice 16-20 provides that, "REALTORS®, prior to or after terminating their relationship with their current firm, shall not induce clients of their current firm to cancel exclusive contractual agreements between the client and that firm. This does not preclude REALTORS® (principals) from establishing agreements with their associated licensees governing assignability of exclusive agreements," (Adopted 1/98).

### **Interference with Agency Relationships**

If an agent attempts to coach a seller into terminating a listing contract, the agent may be committing license law and/or ethical violations. Such conduct may be viewed as giving legal advice in violation of Wis. Admin. Code § RL 24.06(1) and Article 13 of the Code of Ethics. It may also interfere with the existing brokerage relationship in violation of Article 16 of the Code of Ethics. In addition, the agent could be sued civilly in circuit court for tortious interference of contract.

Unless the salesperson has authorization from the broker-employer, the salesperson cannot prepare and execute amendments canceling the broker's listings. The seller and the broker-employer must negotiate any listing terminations. DRL-approved listing contracts state that, "Agents (salespersons) for Broker (firm) do not have the authority to enter into a mutual agreement to terminate the Listing, amend the commission amount or shorten the term of this Listing, without the written consent of the agent's supervising broker."

The same principle and rules also apply to buyer agency agreements.

### **Return of Office Property and Agent Expense Obligations**

Ideally, termination issues concerning the return of office property and the recoupment of agent expense obligations are matters that are addressed in the independent contractor agreement or office policy manual. With respect to agent expenses, the independent contractor agreement may be negotiated to permit the broker to deduct expenses owed by the agent from commissions or bonuses to be paid after termination. Expenses may include errors and omissions (E&O) insurance premiums, advertising costs, office space, telephone service, supplies and any other expenses that are the agent's financial responsibility.

The written agreement should set forth the agent's obligation to immediately return brokerage firm property such as all paper and computer transactional files and documents pertaining to listings, offers or other contracts, and any other office files, office policy books, company computer files and programs, computers and other office equipment, office keys, lock box keys and lock boxes, signs, books, supplies, and a copy of all prospect and referral lists generated while working for the broker.

If these matters are not addressed in the independent contractor agreement or the office policy manual, the broker may have to go to court to retrieve missing property and recover any money owed. The lack of a written agreement may create factual issues and legal disputes, making it difficult to establish the agent's responsibility.

### **Duty to Report Licensee Transfers and Terminations**

When a licensed salesperson is first employed by a broker-employer, whether a new licensee or a licensee previously employed by another broker, the licensee and the broker must complete and sign a Notice of Real Estate Employment (Form #812 - revised 11/05). Pursuant to § RL 17.05, the salesperson/employee may act as an agent of the new broker-employer

when the completed notice form and a check in the amount of \$10 payable to the DRL is mailed or delivered to the DRL.

When a licensed salesperson terminates his or her relationship with a broker-employer, a Notice of Termination of Employment of Broker or Salesperson (Form #766 - revised 7/06) must be completed by either the former broker-employer or the terminating licensee and submitted to the DRL within 10 days after the termination of employment, as is required by § RL 17.06. No fee is required. These forms are available online at <http://drl.wi.gov/prof/rebr/form.htm>. Broker-employers should also notify their local boards when a salesperson is hired or leaves the firm.

### **Office Policy Manuals**

The broker-employer's supervisory duties under § RL 17.08 also include the obligation to "provide all licensed employees with a written statement of procedures under which the office and employees shall operate with respect to handling leases, listing contracts, offers to purchase and other documents relating to transactions." In other words, state law requires the broker-employer to provide a basic office policy manual.

A basic § RL 17.08 policy manual would include an outline of the office's policies and procedures with respect to taking a listing. This might include guidelines concerning the use of approved listing contract forms and any preprinted office addenda, showing procedures, processing listings, seller disclosure forms, etc. Procedures regarding offers, including such things as confidentiality, timely presentations, agency disclosure forms and counter-offers, would also be required, as would similar procedures for any rental listings and lease negotiations. In addition, this basic policy manual would include closing procedures such as responsibilities for closing organization and document preparation.

Beyond this basic content, the scope of an office policy manual can be enlarged and customized to meet the needs of the particular broker and/or company. The

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policy manual can define the respective rights and responsibilities of the broker and the licensed salespeople, supplementing the provisions of the independent contractor agreement. Specific office policies and guidelines can include legally mandated office rules such as sold sign procedures and records confidentiality. Suggested conduct and courtesy guidelines that are not binding for common-law independent contractors, such as dress codes and sales meetings, can also be included in a comprehensive manual.

Finally, an office policy manual can be an invaluable tool for avoiding disputes by anticipating problems and providing mechanisms for solving or eliminating them. This is important for broker/salesperson commission disputes and salesperson termination issues, which are often the source of controversy and prolonged dispute.

The WRA's *Office Policy Manual Guide (2007)* can help brokers write and update their office policy manuals. See [www.wra.org/Products/results.asp?category=%23&title=office+policy+manual+guide&product\\_code=&ForceCategory=BOOKS](http://www.wra.org/Products/results.asp?category=%23&title=office+policy+manual+guide&product_code=&ForceCategory=BOOKS). This *Guide* provides a fairly comprehensive starting place for brokers who can then add and delete material, and modify and expand the policies and procedures included in the *Guide* to meet the individual needs of their respective offices.

### **Personal Offers by Agents Working in the Listing Office**

One issue that may be critical for a broker to address in his or her office policy manual is how to handle agents who want to make personal offers to purchase on property listed by the company. Wis. Admin. Code § RL 24.13(3)(b) prohibits a listing broker or any of the listing broker's agents from submitting a personal offer to purchase on a property listed by that broker/company if that licensee has knowledge of the terms and conditions of any pending offer. This

means that the licensee in the listing office can know that the listing agent received an offer to purchase, but still may submit his or her own offer to purchase as long as the licensee does not know what terms and conditions are in the first offer. This rule is intended to prevent the listing agent or another agent in the company from taking unfair advantage of a buyer by drafting a personal offer to purchase with knowledge of the terms and conditions offered by the first buyer. In other words, an agent in the listing broker's office cannot look at the price or other conditions offered by a buyer and then write a personal offer to purchase that offers more money or better terms. The rule also guards against the appearance of such impropriety.

Prudent listing brokers may wish to evaluate their office policies regarding personal offers written by their agents on company listings. A broker should consider how much risk he or she is willing to undertake and how extensive any documentation or verification procedures should be. In other words, how much risk and fuss and paperwork should be endured in order to permit agents to make personal offers on the company's listed properties?

There are different approaches to the problem. The broker may decide to rely upon his or her agents to not submit any personal offers if they are aware of the terms or conditions in a third-party offer. The broker might require an agent submitting a personal offer on a company listing to sign an affidavit swearing that the agent has no knowledge of the terms or conditions of any pending third-party offers. The broker could go a step further by supplementing the affidavit with an affidavit from the listing agent confirming that the agent writing the offer has no knowledge of the terms and conditions of the third-party offer. A broker might also require any agent wanting to make an offer on a company listing

to clear the offer with the broker before submitting the offer to the listing agent. That way, the broker can conduct his or her own investigation and verify that the agent is unaware of the contents of any third-party offer. Or, the broker may decide that the whole business is not worth the risk, and forbid his or her agents from submitting any offers on company listings if there are any pending offers.

### **Licensee Purchase, Sales and Rentals of Personal Real Estate**

Another matter that may be important for the broker to address in the office policy manual is personal real estate transactions engaged in by the broker's agents.

Under the law of agency, the agent is prohibited from competing with the principal. A licensee can be either a principal or an agent in a transaction, but conflicts of interest occur when a licensee tries to be both. When acting as a buyer of real estate, the licensee is a principal in the transaction and not the agent for anyone. Therefore, the buyer/licensee cannot collect a commission from the seller because the buyer/licensee cannot perform services on behalf of the seller with undivided loyalty when the licensee has his or her own interest as a buyer at stake. It is also inconsistent for a buyer/licensee to act as his or her own agent and collect a commission for representing oneself. Instead, a buyer/licensee can negotiate a buyer's incentive to be paid by the listing broker or the seller. This incentive can be for the amount of the co-broke commission which would otherwise be paid to the selling broker in the transaction.

The buyer's incentive should be properly documented in writing before closing, preferably before the offer to purchase is executed. An incentive from the listing broker should be documented in a separate letter or memo because it is a separate agreement between the licensee/buyer and

the listing broker. Under the DRL's interpretation of Wis. Admin. Code § RL 24.05(4), the seller also must consent in writing to this incentive no later than the time that the offer is accepted. So, a recitation in the offer regarding the incentive from the listing broker to the licensee/buyer may be the most efficient way to meet this requirement and avoid any possible DRL enforcement actions.

There is no "secret" form or language for the incentive agreement. However, the agreement should identify the parties and the transaction, and indicate how the incentive is earned, when it is paid, and who will pay it. For example, an incentive agreement might provide, "As an inducement to Aaron Agent to purchase the property at 123 Main Street, Anytown, Wisconsin, XYZ Realty, Inc., promises to pay to Aaron Agent an incentive in the amount of \$3,000 at the time of closing provided the closing occurs on or before December 31, 2008."

When drafting the offer, line 1 of the offer should be crossed out. In addition, the licensee must disclose his or her licensee status as required by Article 4 of the Code of Ethics and Standard of Practice 4-1. In the interest of full disclosure, the licensee also may wish to write in the offer that he or she is a licensed real estate agent/broker purchasing the property for personal use/investment/speculation/resale, as the case may be.

As an alternative, the broker of the licensee/buyer could act as a sub-agent of the listing broker or as a buyer's broker, write the offer for the licensee/buyer, and claim the cooperative commission as the "procuring cause" of the sale.

If the licensee's broker acts as a sub-agent, the broker must fulfill his or her normal agency duties representing the interests of the listing broker and seller. In addition, Wis. Admin. Code § RL 24.05(2) and Article 4

of the Code of Ethics require disclosure of the relationship between the subagent and the licensee/buyer and the prior written consent of the all parties, typically obtained in the offer.

If the licensee's broker acts as a buyer's broker, the broker must fulfill his or her normal agency duties representing the interests of the licensee/buyer. Pursuant to Wis. Admin. Code § RL 24.07(8)(a) and Standard of Practice 16-11, the buyer's broker must disclose the buyer agency upon first contact. In addition, pursuant to Wis. Admin. Code § RL 24.05(2) and Article 4 of the Code of Ethics, the buyer's broker must disclose the relationship between the buyer's broker and the licensee/buyer and obtain the written consent of the parties in the offer.

The broker and the licensee/buyer may have an agreement whereby the broker pays the licensee/buyer an incentive, or this may be required by the broker's office policies and procedures. If the buyer/licensee will receive an incentive or any other payment from broker derived from the cooperative commission, the seller also must consent in writing no later than the time that the offer is accepted to ensure no violations of Wis. Admin. Code § RL 24.05(4). A recitation in the offer regarding the incentive from the cooperative broker may be the most efficient way to meet this requirement and avoid any possible DRL enforcement actions.

### **Mandatory Posters**

Another important item, in addition to the office policy manual, for office management is compliance with the federal and state labor laws that require that posters be hung advising staff about various employment and labor laws. A Wisconsin Complete Compliance Kit of laminated posters complying with all applicable federal and state labor and employment laws may be purchased from the G. Neil Companies at [www.gneil.com](http://www.gneil.com).

### **Solicitation of Independent Contractor Salespeople**

Wisconsin law does not prohibit broker-employers from offering employment opportunities to independent contractor salespeople working for another broker. Because independent contractor relationships are terminable at will, such solicitation has not been held to be an unlawful interference with an employment relationship. On the other hand, civil liability could result if a broker solicited another broker's employee/salesperson. Prudent practice suggests that brokers soliciting the agents of another broker first identify the agents' employment relationships.

### **Errors and Omissions Insurance**

Two weeks after a successful closing there is a rainstorm, and the basement floods. The buyer contacts the seller and asks, "What's going on here? You didn't say anything about a leaky basement in your property disclosure form." The seller's reply will often involve some variation on the theme that he did not say anything about it because his salesperson told him not to. The buyer then sues the seller and salesperson (and the salesperson's firm) for misrepresentation. Unless the salesperson can prove otherwise, this lawsuit will become a matter of the salesperson's word against the word of the seller.

According to the NAR, nearly 70 percent of all claims against real estate professionals are a result of misrepresentations concerning disclosure of defects. And in today's market, real estate buyers and sellers are filing lawsuits at an accelerating pace. Real estate practitioners increasingly find themselves in the crossfire of that litigation and may come to regret it if they do not carry E&O insurance.

E&O insurance is designed to provide comprehensive professional liability insurance coverage for real estate salespersons and brokers. In essence,

it is malpractice insurance for the real estate professional. E&O insurance provides coverage for errors and omissions of real estate brokers and agents in providing advice or other services to their customers or clients. The insurance is intended to protect brokers and agents against liability claims or lawsuits for damages caused by errors (something they did) or omissions (something they failed to do).

E&O insurance coverage also defends the insured in lawsuits. No matter how carefully a broker or agent does his or her job, the real estate broker is at risk, even from lawsuits that may be unfounded or frivolous. Legal expenses must be paid no matter who wins in court, and those costs can be devastating to a broker's finances. With E&O coverage, the insurance company defends the claim, and pays any settlement or judgment against the insured broker up to the limits of liability stated in the policy.

In addition to standard insurance protection for errors and omissions in providing brokerage services, E&O insurance may provide coverage for appraisal and property management, lock box property damage, fair housing discrimination, regulatory complaints, innocent partner fraud protection, mortgage broker coverage and failure to advise for commercial and residential environmental pollutants including asbestos, radon and lead. Although coverage options vary among carriers, E&O policies generally do not cover: fraudulent and criminal acts, insolvency, failure to collect escrow or tax money, employment contracts, bodily injury claims, libel, slander or defamation, pollution and toxic waste, violations of securities law, conversion, misappropriation or commingling of funds, failure to maintain adequate levels of insurance and liability assumed under various indemnity agreements.

Most E&O insurance policies cover claims made during

the life of the policy, regardless of when the alleged injury occurred.

A helpful brochure regarding E & O insurance is available at [www.realtor.org/letterlw.nsf/23e5e39594c064ee852564ae004fa010/a652a5835187d7f386257015005abb80/\\$FILE/Brochure.doc](http://www.realtor.org/letterlw.nsf/23e5e39594c064ee852564ae004fa010/a652a5835187d7f386257015005abb80/$FILE/Brochure.doc) or see the *NAR Field Guide to Errors & Omissions Insurance* at [www.realtor.org/libweb.nsf/pages/fg701](http://www.realtor.org/libweb.nsf/pages/fg701).

## Legal Hotline Questions and Answers

The WRA Legal Hotline receives a variety of office practice questions. The following is a sample of the issues raised by Hotline callers.

**Can a licensee offer to donate a portion of his or her commission to a non-profit organization for each referral the licensee receives from a member of that organization?**

It is the position of the DRL that advertising that a portion of the licensee's commission will be donated to a non-profit organization or charity in order to attract business referrals constitutes illegal fee-splitting in violation of Wis. Stat. § 452.19. Section 452.19 limits the payment of referral fees, finder's fees and commission splits to other Wisconsin licensees or persons actively engaged in real estate practice in other states. The proposed offer creates an advance agreement or expectation that the licensee's commission will be split with a non-licensee.

**All of the secretaries working for a temporary service received a brochure from a local builder offering \$500 for any referral resulting in the builder's construction of a new house. Is this legal?**

Wis. Stat. § 452.19 permits a broker to pay referral fees and finder's fees to other Wisconsin licensees holding active licenses. Referral fees due to employed salespersons must be paid to their broker-employers, while salespersons not working for a broker-employer can be paid directly. A licensed broker cannot offer referral

fees to the general public. However, there are no regulations prohibiting a non-licensee builder from offering a referral fee to the general public for construction contract referrals because this does not constitute real estate practice and because no licensees are involved. A construction contract alone, not offered in conjunction with the sale of a lot, is a contract for services and materials, not real estate.

**Is it legal for a broker to accept a finder's fee from a FSBO?**

A referral fee offered and paid by a non-licensee to a licensed broker is not subject to Wis. Stat. § 452.19 or other regulation by the DRL. The seller's referral fee can, therefore, be accepted by the broker.

**Can a broker, as a broker/owner, own two separate real estate companies?**

Wis. Stat. § 452.12(2) provides that a corporation can be licensed if the corporation has at least one officer licensed as a broker. The statutes and the DRL rules do not prohibit one broker from being the business representative for more than one business entity.

**What are the guidelines for salespeople who sell and buy their own properties?**

Licensees selling or buying their own properties must comply with Wis. Admin. Code §§ RL 24.04 and 24.05. Section RL 24.04 provides that a licensee advertising the sale of a personally owned property must list the property with the broker and advertise in the broker's name. Alternatively, the licensee may advertise the occasional sale of personally-owned real estate on a FSBO basis if the advertising indicates the seller is a "licensee-owner." Section RL 24.05(2) requires that licensees acquiring or selling real estate on their own behalf must disclose their interest to all parties to the transaction, and § RL 24.05(3) requires licensees to disclose any fees and commissions received as part of the sale.

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The sales of a salesperson's personally owned real estate can lead to potential liability on the part of the broker-employer for damages resulting from such unsupervised sales activity. Section RL 17.08 requires a broker-employer to supervise the activities of all salespeople, but the DRL has interpreted this rule to be limited to only those activities requiring licensure under Wis. Stat. § 452.01. Because this statute does not require a license for the occasional sales of personally owned real estate unless there is a pattern of sales, the DRL does not require broker supervision of a salesperson's personal real estate transactions. Brokers and their salespeople should identify in simple memoranda those transactions where supervision is not required.

Despite the absence of any supervision responsibilities, the broker-employer faces potential liability based on assumptions that may be made by third parties dealing with a salesperson selling or buying property for themselves. These parties may assume that they are dealing with the broker through the agent instead of with the agent on a personal basis. The broker-employer could be liable for errors made by the salesperson unless reasonable steps are taken to avoid the misconception that the salesperson was acting as an agent of the broker-employer.

The broker-employer can require that all real estate activity involving agents' personally owned properties be performed under the office's supervision. Commission rates can be adjusted to cover any additional overhead or expenses incurred by the agents in these transactions.

Alternatively, the broker-employer can establish guidelines and safeguards to avoid the appearance that the broker is responsible. The broker may require that salespeople never meet or telephone their "personal clients" at the broker's office and that

the salespeople have their own business cards and letterhead. Brokers may also require a disclosure letter be given to all "personal clients" indicating there is no broker involvement. Career apparel should not be worn when doing personal work and removable logos should be removed from cars.

Once a broker-employer has selected the best approach for the office, a policy regarding the selling or buying of personally owned property should be developed. This policy can then be incorporated into the office policy manual.

### **Broker-in-a-Box**

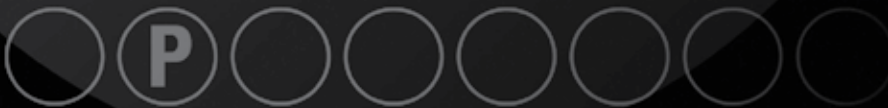
Broker-in-a-Box is a consolidation of products available from the WRA to assist a broker in opening an office. Discussion and direction are provided on securing loans, establishing a business entity, establishing a trust account, determining insurance needs and trademarks, etc. A partial list of items in the box includes: *Broker Desk Reference*, *Office Policy Manual*, *Wisconsin Real Estate Clause Manual*, *Real Estate Trust Accounts in Wisconsin*, and a *Trust Account Journal*. See Item #KITBRBOX – 2007 at [www.wra.org/Products/results.asp?category=~brplsa~](http://www.wra.org/Products/results.asp?category=~brplsa~).

The *Broker Desk Reference*, which is a component of the Broker-in-a-Box, is a key component of the kit. It is full of checklists, articles and resources relating to various topics brokers should consider in their business, specifically, accounting, insurance, business entities, employment law, membership, licensing, trademarks and copyrights. Practice-related issues of dispute resolution and risk reduction are also addressed.

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