

# REAL ESTATE ASSISTANTS

## SUMMARY:

**Recommended office policies.**

**Employment status and duties delegable to licensed assistants.**

**Employment status and duties delegable to unlicensed assistants.**

**Assistants used by multiple licensees.**

**Virtual assistants.**

According to the [2015 National Association of Realtors® Member Profile](#)<sup>1</sup>, 18% of Realtors® use at least one personal assistant, and this number has been steadily increasing in recent years. When Realtors® take on a personal assistant, it is important to be mindful of the legal limitations placed on licensed and unlicensed assistants, and have policies in place to ensure compliance with applicable laws.

## RECOMMENDED OFFICE POLICIES

Every broker should adopt a written policy for its brokerage and salespersons relating to the hiring and activities of real estate assistants. Here are a few topics that should be addressed in such a policy:

- whether assistants must be licensed, or if they may be unlicensed;
- what functions an unlicensed assistant may perform;
- whether assistants must be employees or if they may be independent contractors;
- whether assistants may be employees of the salesperson, the broker, or either one;
- the allowed methods of payment of assistants, particularly licensed assistants, who must receive payment from the broker for licensed work pursuant to [Minn. Stat. § 82.70, subd. 1](#)<sup>2</sup>;
- directions regarding any required withholding, insurance coverage (including health and life (if offered), workers' compensation, unemployment, and Errors and Omissions), treatment of benefits (such as pension, 401k, and profit-sharing systems) and other compensation-related issues, and possibly a recommendation or requirement for using a payroll service to ensure compliance;
- any administrative requirements to be imposed, such as filing timesheets or submitting paperwork to the salesperson or the broker; and
- the written agreements that will be required, such as:
  - \* an employment agreement between the assistant and salesperson who employs him/her, or an independent contractor agreement between the assistant and the broker or salesperson; and
  - \* an agreement between the broker and salesperson describing the system under which salespersons are permitted to hire assistants, and the lines of responsibility and liability for supervision and compensation.

1 <https://www.nar.realtor/research-and-statistics/research-reports/highlights-from-the-nar-member-profile>

2 <https://www.revisor.mn.gov/statutes/cite/82.70>

## EMPLOYMENT STATUS AND DUTIES DELEGABLE TO LICENSED ASSISTANTS

Licensed assistants can perform the same services as the salesperson. The main issue with licensed assistants is whether the assistant is an employee or an independent contractor. Under **Internal Revenue Code § 3508(b)(1)**<sup>3</sup>, real estate agents are considered independent contractors if all of the following is true:

- they are licensed;
- substantially all of their compensation is directly related to sales output (in the form of commissions); and
- there is a written independent contractor agreement between the broker and the assistant or the salesperson and the assistant.

If a licensed assistant is paid compensation, according to **Minn. Stat. § 82.70, subd. 1**<sup>4</sup>, the broker must pay that person directly. Thus, if a single salesperson is hiring the licensed assistant directly, then the salesperson, licensed assistant, and broker should enter into an agreement to define the assistant's relationship to the broker, including how and when he or she will be paid by the broker. See the Department of Commerce, Chapter 82, Brokerage Management and Broker Licensee Relationships, and Licensee Conduct section for further details.

## EMPLOYMENT STATUS AND DUTIES DELEGABLE TO UNLICENSED ASSISTANTS

Until 2004, there were significant limitations on what an unlicensed assistant could do under Department of Commerce (DOC) Rules and Minnesota law. While **Minn. Stat. § 82.81, subd. 4**<sup>5</sup>, states that a licensee may not engage anyone other than another licensee to act on his or her behalf as a broker, salesperson, or closing agent, in 2004, the law expanded to allow unlicensed assistants to do some tasks for licensees: **Minn. Stat. § 82.73, subd. 3(d)**<sup>6</sup> states:

“A broker may allow any unlicensed person, who is authorized by the broker, to disclose any factual information pertaining to the properties listed by the broker, if the factual information is provided to the unlicensed person in written form by the broker representing or assisting the seller(s).”

The DOC has since stated that unlicensed assistants may assist by hosting an open house (only if the assistant provides only written materials or reads from a script), distribute written material about the property, and take names and phone numbers; however, he or she cannot answer questions from consumers, unless the answers to those questions are contained within the written materials or other written statement from the broker. An unlicensed assistant also cannot draft purchase agreements, take buyers on showings, negotiate on behalf of a buyer or seller, or perform any other function that a real estate agent traditionally performs in providing a service to the client or customer. An unlicensed assistant is also prohibited from asking questions of a consumer to determine their wants and/or needs. An unlicensed assistant is unlikely to be able to take buyers on showings

3 <https://www.govinfo.gov/content/pkg/USCODE-2011-title26/pdf/USCODE-2011-title26-subtitleC-chap25-sec3508.pdf>

4 <https://www.revisor.mn.gov/statutes/cite/82.70>

5 <https://www.revisor.mn.gov/statutes/cite/82.81>

6 <https://www.revisor.mn.gov/statutes/cite/82.73>

for various reasons, including, but not limited to issues related to whether proper permission was granted by the listing agent or seller and their understanding of who would be attending the showing, issues related to access, and the fact that the unlicensed assistant cannot answer questions about the property unless it's in writing from the licensee.

Unlicensed assistants are usually employees. First of all, they do not fit within the IRS real estate agent-related provisions of **Internal Revenue Code § 3508(b)(1)**<sup>7</sup>, because they are not licensed. Thus, if a broker or salesperson hiring the unlicensed assistant wishes to have him or her be an independent contractor, the broker or salesperson will be susceptible to the general, more complicated **IRS test**<sup>8</sup> related to the analysis of whether a person qualifies as an independent contractor. If an unlicensed assistant is misclassified as an independent contractor, the employer may be liable for payroll taxes and other expenses. Either way, an independent contractor or employment agreement should be entered into between the unlicensed assistant and the broker or salesperson.

In addition to the decision whether the unlicensed assistant is an employee or an independent contractor, if the unlicensed assistant is hired by a salesperson instead of the broker, the salesperson, broker, and unlicensed assistant should also have an agreement defining the relationship between the broker and the assistant.

## ASSISTANTS USED BY MULTIPLE LICENSEES

If an assistant works exclusively for a salesperson, the employee or independent contractor relationship would normally be between the salesperson and the assistant (even though Minnesota law requires that commissions be paid by the broker). However, if more than one salesperson uses the assistant, then the employee or independent contractor relationship would likely be between the broker and the assistant. In that case, all compensation, whether commission or salary, would likely be paid directly by the broker, and salespersons utilizing the assistant would likely reimburse the broker. Accordingly, there should be an employment or independent contractor agreement between the broker and the assistant, defining the terms of the relationship; and there should be a separate agreement between the broker and salespersons, covering compensation, supervision, control and accountability issues.

## VIRTUAL ASSISTANTS

As real estate professionals are getting busier, many are looking for help with managing their workload. Some licensees are hiring assistants or working as a team, but others are looking to transaction management and other virtual assistants as contractors outside of their brokerage for help. While the use of these contractors may be appealing and effective for managing a heavy workload and reducing overhead costs, there are many factors that should be considered, and the risks and benefits should be weighed to make sure that utilizing them is the best

7 <http://www.fourmilab.ch/uscode/26usc/www/t26-C-25-3508.html>

8 <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee>

overall option for licensees.

To help licensees understand what factors to weigh in making their own determinations and ensuring they stay on the right side of the regulations, here are a few factors to consider:

- **Licensure.** Must be licensed to perform licensed activity. Is this contractor engaging in any acts on your behalf that require a real estate license in Minnesota? If so, doing those tasks without a license is a violation of the state licensing statute. Although it would be their violation to do licensed work without a license, it could turn into a licensing and Code of Ethics issue for you and the broker as well. If they are handling files on your behalf and for your clients without your clients' consent, you may be in breach of your fiduciary duties owed to your client.
- **Brokerage.** If licensed, licensee can only act on behalf of the broker to whom they are licensed. If the person doing this work is licensed in Minnesota, what brokerage is the person with? In Minnesota, a "salesperson shall only conduct business under the licensed name of and on behalf of the broker to whom the salesperson is licensed." This means that if the person is licensed, and not to your brokerage, they would be acting outside of the licensing requirements of Chapter 82 if handling tasks on your behalf that would require a license. Remember, the broker is responsible for all of the acts of their salespeople and closing agents while acting as agents on the broker's behalf and must adequately supervise the activities of the broker's salespersons and employees. [Minn. Stat. § 82.73, subs. 1-3](#)<sup>9</sup>.
- **Agency Fiduciary Duties.** If this person is not a salesperson with your brokerage, they have not formed an agency relationship with your client. This means they do not owe fiduciary duties to your client. Thus, passing off work could compromise your clients. For instance, the duty of confidentiality, or the duty to act in the client's best interest, may be owed by you to the client, but would not be owed by the outside assistant, unless it is otherwise owed by the contract you have with the contractor.
- **Compensation.** As a general rule in Minnesota, in connection with a real estate transaction, a real estate broker or salesperson cannot offer, pay, or give, and person shall not accept, any compensation or thing of value from the broker or salesperson for commission-splitting, rebate, referral fees or otherwise with certain exceptions. If the contractor is not a real estate licensee, they could not be compensated. A real estate licensee also cannot pay and a licensee may not accept any compensation or other valuable consideration for the performance of acts requiring a real estate license from any person except the real estate broker to whom they are licensed. [Minn. Stat. § 82.70, subs. 1 & 2](#)<sup>10</sup>.
- **Real Estate Settlement Procedures Act (RESPA) Referral and Fee Splits.** This contractor cannot be paid a referral fee to refer clients to the real estate salesperson or the brokerage when there is a federally related mortgage loan involved in the transaction. A broker also cannot split a settlement-service fee paid by a consumer to a third party if the third party (outside of the brokerage) performed no services in exchange for the fee. [12 U.S.C. § 2607](#)<sup>11</sup>.

9 <https://www.revisor.mn.gov/statutes/cite/82.73>

10 <https://www.revisor.mn.gov/statutes/cite/82.70>

11 <https://www.govinfo.gov/content/pkg/USCODE-2011-title12/pdf/USCODE-2011-title12-chap27-sec2607.pdf>

## RESOURCES ON REAL ESTATE ASSISTANTS:

### MINNESOTA STATUTES AND RULES

**Chapter 82: Real Estate Brokers and Salespersons:** [www.revisor.mn.gov/statutes/cite/82](http://www.revisor.mn.gov/statutes/cite/82)

**82.70: Compensation:** [www.revisor.mn.gov/statutes/cite/82.70](http://www.revisor.mn.gov/statutes/cite/82.70)

**82.73: Standards of Conduct:** [www.revisor.mn.gov/statutes/cite/82.73](http://www.revisor.mn.gov/statutes/cite/82.73)

### FEDERAL STATUTES

**12 U.S.C. § 2607:**

[www.govinfo.gov/content/pkg/USCODE-2011-title12/pdf/USCODE-2011-title12-chap27-sec2607.pdf](http://www.govinfo.gov/content/pkg/USCODE-2011-title12/pdf/USCODE-2011-title12-chap27-sec2607.pdf)

### INTERNAL REVENUE SERVICE

**IRS Code 3508:**

[www.govinfo.gov/content/pkg/USCODE-2011-title26/pdf/USCODE-2011-title26-subtitleC-chap25-sec3508.pdf](http://www.govinfo.gov/content/pkg/USCODE-2011-title26/pdf/USCODE-2011-title26-subtitleC-chap25-sec3508.pdf)

### NATIONAL ASSOCIATION OF REALTORS®

**NAR's Field Guide on Personal Assistants:** [www.nar.realtor/personal-assistants#section-166132](http://www.nar.realtor/personal-assistants#section-166132)