



EBBA Rising: The New Buyer Broker Agreement in Florida

***Presented by Andrew "The Agent's
Attorney™" Doyle, Esq.***

> INTRO

> OVERVIEW

> COMPARING THE
EBBAS

> BEST
PRACTICES

> CONTACT

SD
**SEIBANE
DOYLE** PLLC

@orlandolawyers

407.906.2777
andrew@sd-firm.com

**Business and Real Estate law
are all we do.**

**Dirt.
Paper.
Money.™**

> DISCLAIMER



DISCLAIMER!!!

*****ALL CONTENT HEREIN IS BEING PROVIDED FOR INFORMATIONAL AND EDUCATIONAL PURPOSES ONLY AND SHOULD ONLY BE UTILIZED FOR THAT PURPOSE.**

*****IT IS NOT INTENDED NOR SHOULD IT BE CONSTRUED TO BE LEGAL ADVICE AS TO ANY PARTICULAR SCENARIO, SITUATION, OBJECTIVE, CONTRACT, RELATIONSHIP AND/OR TRANSACTION.**

*****EVERY LEGAL SCENARIO AND EVERY REAL ESTATE TRANSACTION OR CONTRACT IS UNIQUE AND SPECIFIC LEGAL ADVICE SHOULD BE OBTAINED BASED ON THE FACTS APPLICABLE.**

Agent Session Overview



KEY POINTS

- Quick review of NAR Settlement BBA Rule
- Compare/Contrast Old and New EBBA
- Best Policies, Practices and Procedures

> NAR
SETTLEMENT
UPDATE

Refresher: Key Takeaways of the NAR Settlement

> MORE

1. Release of Liability: Releases NAR + >1mm members, all state/territorial and local REALTOR® associations, association-owned MLSs, and certain brokerages (w/ NAR member principal + 2022 residential transaction volume <\$2 billion)
2. Changes to Compensation Offers: NAR rule prohibiting offers of compensation on the MLS. Compensation negotiation off-MLS and seller concessions on the MLS are still options. (Originally effective mid-July 2024; now August).
- 3. Requirement for Written Agreements: NAR rule requiring buyside MLS participants to have a buyer-broker agreement before showing or "touring" the home (Originally effective mid-July 2024; now August).**
4. Settlement Payment: NAR will pay \$418 million over approximately 4 years. NAR promised no changes to membership dues for 2024 or 2025 due to this payment.
5. Denial of Wrongdoing: Despite the settlement, NAR maintains that its cooperative compensation and current policies are beneficial, promoting property ownership access, especially for lower- and middle-income buyers.

What's The Latest?

- **MLS Policy Change Deadline Pushed to August 17, 2024**
- **FAR Form Update – Arrived**
 - *June 23, 2024 – Two Compensation Agreements and Two Modification Agreements released*
 - *July 9, 2024 – New EBBAs (EBBA 7tb, 7sa and 7nr) released*
- **Existing BBAs and Listing Agreements?**
 - *They may not be compliant if the new form isn't used because of conspicuous disclosure required, so better to be safe and have it reigned with the new form*

> MORE

What Do the EBBAs Need to Say Now?

- **NAR Resource Launched and Updated (facts.realtor)**
- **Released details about what Buyer Broker Agreements (BBAs) must contain**
 - A specific and conspicuous **disclosure of how compensation is determined**
 - The **amount** of compensation (specific and not open-ended)
 - A **cap** on the amount of comp **that does not exceed the amount in the BBA**; and
 - A conspicuous **statement that broker fees and commissions are not set by law and are fully negotiable.**

> MORE

When is the Requirement for the Signed EBBA Triggered?

> MORE

- **The change requires written EBBA's when**
 - **MLS Participant is "working with" a buyer AND**
 - **Buyer is touring a home**
- **"Working with"** = identifying potential properties, arranging for the buyer to tour a property, performing or facilitating negotiations on behalf of the buyer, presenting offers by the buyer
- **"Touring a home"** = when the buyer and/or the MLS Participant, or other agent, at the direction of the MLS Participant working with the buyer, enter the house (or do virtual showing).
- **Open House/Door Open Exception**
- **If encountering a buyer in an open house or opening a door for an unrepresented buyer, no EBBA needed**

Gotta Love Them Exceptions...

- **Open House/Door Open Exception**
 - If encountering a buyer in an open house or opening a door for an unrepresented buyer, no EBBA needed
- **Listing Agent Hosting Open House**
 - Does not need every prospective buyer to sign EBBA because LA is working for SELLER
- **Listing Agent Comms with Prospective Buyer**
 - **If communication occurs as LA is working for the seller then no. if Buyer wants LA to rep them or submit an offer on their behalf, then YES.**

Summar/Overview of Changes

> Next

The New EBBA (v7) has the following changes

- New Disclosures re commissions and caps
- Mandatory reduction in BB comp from seller offer of comp (revised for clarity)
- Retainer is in addition to any compensation earned by the Broker. (used to be an option to select)
- Property description and price range now removed
- Greater distance between BB and buyer re Buyer's financial transactions
- Buyer obligation of good faith effort to perform (new term)
- Default 30 days with option to change for Protection Period
- Addition of cancellation fee if Buyer terminates BBA
- Removed mandatory arbitration and made a box to check and if not, litigation is permissible

Changes in Detail

> Next

- Section 1 – Dropped language of “**buyer**” and **replaced with “consumer”** and dropped “**seller**” and **replaced with “owner”** throughout.
 - **Analysis: Recasts narrative that buyers are consumers to track the anti-trust language.**
- Section 2 – No change
- Section 3 – **Deleted price range, pre-qualification condition** and the blank space for “preferred terms”
 - **Analysis: Distances Broker from financial matters re Consumer.**
- Section 4 – Broker Obligations – **Remove language that Broker will help “determine financial capability and financing options”** and language that said that Broker’s duties to buyer remain even if there is an offer of comp from the seller and moved it to next paragraph (4b). Section 4(c) Fair Housing and 4(d) Service Providers remain the same.
 - **Analysis: Distances Broker from financial matters re Consumer**

Changes in Detail

> Next

- Section 5 – “Buyer Obligations” is now “Consumer Obligations”
 - Added **obligation for consumer to provide accurate information** to “necessary third parties (e.g., lender, closing agent)”
 - **Removed word “financial”** from the type of information buyer will provide;
 - added 5(g): **“Making a diligent good faith effort to perform the contract terms of any purchase agreement or contract to lease and close on the sale of any property Consumer contracts to acquire”**
- ***Analysis: Distances Broker from financial matters re Consumer. Also, the addition of Para. 5(g) imposes a contractual obligation to act toward to closing to address unsavory Consumers and provides a litigation basis for Broker enforcement***

Changes in Detail

> Next

- Section 6 – Retainer.
 - Nonrefundable is bolded
 - **Retainer amounts are now expressly in addition to any compensation received**
 - Carve out to not treat it as a fee for a rental information listing under chapter 475.
- ***Analysis: This essentially allows a Broker to get a nonrefundable retainer upfront before time and effort is expended to hedge against possibility Buyer does not pay or cannot pay at closing.***

Changes in Detail

> Next

- Section 7 – Compensation.
 - Added language that **locks in compensation even when buyer defaults** on a contract to acquire a property;
 - Clarifies that **compensation is for Brokers services** to buyer;
 - Contains **language to set off amount of compensation** with anything received from sell side offer of comp;
 - Clarifies **broker fee under the EBBA is due at closing and closing is not a prerequisite** for the compensation obligation;
 - Additional fee blank space (for transaction fee provisions).
- ***Analysis: This is proactive litigation drafting to help ensure that Buyer paid compensation is payable and will be paid at closing on the closing statement and empower closing agent to actually write that compensation in as a Buyer cost at closing.***

Changes in Detail

> Next

- Section 8 – Protection Period – **default of 30 days for Protection Period** was added (or you can choose your own time period)
- Section 9 – “Early Termination” is now “Conditional Termination”
 - Includes a built in **cancellation fee** provision;
 - **Consumer is responsible for full compensation amount minus cancellation fee** if the agreement is conditionally terminated depending on timing.
 - ***Analysis: Helps to hedge payment issues with Buyers who cannot or refuse to pay when discovered prior to closing and that liquidates the contract claim by making the fee manageable enough that many litigation issues can be avoided. Streamlines the transition if Buyer wants to work with someone else.***

Changes in Detail

> Next

- Section 10 – Dispute Resolution – A completely new framework.
 - Old procedure was mandatory mediation followed by binding arbitration. Procedure is **now** first to do **mandatory mediation and then if not resolved, arbitration is an option only if the box is checked.**
 - Prevailing party attorneys fees provisions added for both litigation and for arbitration.
 - ***Analysis: Litigation of these new agreements is expected to increase simply because they will now have to be used in all cases. Arbitration can be an expensive way for Broker to enforce these agreements, so they now have an option to move forward with traditional litigation (which may include a small claims action depending on amount of commission owed).***

Changes in Detail

- Section 11 and 12 – Assignment and Brokerage Relationship – no changes.
- Section 13 – Special Clauses is now “Other Terms” No change and still blank space for additional items.
- Section 14 – Acknowledgment – **added conspicuous disclosure required by NAR settlement** re commissions being negotiable; caps compensation for broker at amount in the agreement as required by NAR settlement however has a carve out for separate compensation to Broker by owner for services rendered to OWNER.

WHAT ARE THE BEST PRACTICES FOR AGENTS NOW?



- **Talk to your Broker Now**

- *Ask your Broker for help, support and education*
- *Not sure how to talk to a buyer? Ask your broker*
- *Questions about how the office wants the agreements filled out? Ask your broker.*

- **Acclimate to EBBA Use Now**

- *If BBAs are not already part of your routine, begin using them now.*
- *Discuss what office policies are for BBAs (cancellation fee, protection period, etc.)*



Andrew B. Doyle, Esq

O: 407.906.2777

E: andrew@sd-firm.com

IG: [@orlandolawyers](#)