

Alaska Real Estate Commission

Broker Manual



State of Alaska

Department of Commerce, Community, and Economic
Development

Division of Corporations, Business and Professional Licensing
Real Estate Commission

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www.commerce.state.ak.us/occ/prec.htm

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January 27, 2006

Dear Alaska Broker:

Congratulations on becoming a real estate broker!

To assist you in your new endeavor, the Real Estate Commission provides this publication to help you open and operate your real estate brokerage in compliance with Alaska law. This publication is provided to all Alaska brokers, and was paid for entirely by licensees through the real estate surety fund education appropriation.

Within this handbook you will find sections outlining:

- Decisions you will need to make before opening your office
- The legal requirements you must meet
- Choices you must make about it's operation, and
- The most frequently asked questions

If you have any additional questions after reading any section of the handbook, please contact the Real Estate Commission or the numbers referenced in this publication.

On behalf of the Real Estate Commission, I wish you success in your real estate career.

Sincerely,

Barbara Ramsey, Chair
Alaska Real Estate Commission

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I. CHOOSING YOUR BUSINESS TYPE

You must decide whether your business will be a sole proprietorship, a partnership, limited partnership, a limited liability company or a corporation. It's a good idea to consult a Certified Public Accountant (CPA) and/or an attorney to advise you of the form of business that best suits your specific needs.

SOLE PROPRIETORSHIP

You may start your business as a sole proprietorship by obtaining a business license and your broker license.

Under the sole proprietorship, the owner establishes the business, secures all capital, assumes all risks, receives all profits, and incurs all losses.

PARTNERSHIP

Two or more persons associated to pursue a business for profit may form a partnership. The partners assume full liability for the obligations of the firm. In addition to the business assets, the personal assets of the owners, may be attached by creditors. A business license is necessary, and a broker's license is required to register the company.

LIMITED PARTNERSHIP

In a Limited Partnership, one or more 'general' partners manage the business while "limited" partners contribute capital and share in the profits but take no part in running the business. General partners remain personally liable for partnership debts while limited partners incur no liability with respect to partnership obligations beyond their financial contributions. To form a limited partnership, individuals must file a certificate of intent in the district recording office that has jurisdiction over the principal business location.

The general partner must register limited partnership interests as securities with the Department of Commerce, Community, and Economic Development, Division of Corporations, Business and Professional Licensing, unless exempted from registration by the Alaska Security Act of 1959.

The partners must also sign and deliver to the Corporations Section an original and exact copy of a Certificate of Limited Partnership. (AS 32.11.010 sets out requirements of the certificate). Forms are available upon request.

The partnership must obtain a business license from the Department of Commerce, Community, and Economic Development, Division of Corporations, Business and Professional Licensing before doing business in Alaska.

LIMITED LIABILITY COMPANY

A limited liability company (LLC) is an unincorporated association having one or more members. The LLC can be operated by managers or members. A Domestic LLC is a legal entity created under Alaska Statutes by submitting the Articles of Organization and fees to the Division of Corporations, Business and Professional Licensing. A Foreign LLC is a legal entity created under laws of another state and applies for a Certificate of Authority to transact business in Alaska and pays the appropriate fees to the Division of Corporations, Business & Professional Licensing.

CORPORATIONS

One of the most important decisions facing those entering business is whether the business should be operated in the corporate or non-corporate form. It is strongly suggested that legal and tax advice be sought before you decide whether or not to incorporate.

If stock is sold in any corporation, it must either be registered or be exempt from registration, according to the Alaska Securities Act of 1959 (AS 45.55).

FACTS ABOUT CORPORATIONS

One or more “natural” persons 19 years or older may act as incorporators by filing Articles of Incorporation with the Department of Commerce, Community, and Economic Development Corporations Section. Once the Articles are filed in conformance with Chapter 10 of the Alaska Statutes and all necessary fees and taxes are paid, a Certificate of Incorporation is issued naming the corporation and date of incorporation.

S CORPORATION

If you choose to develop as an S Corporation, contact the Internal Revenue Service for specific terms and regulations regarding:

- Formation of an S Corporation
- Qualifications
- Shareholder Consents
- Violating the Passive Income Restriction
- S Corporation Termination Year
- Filing Form 2553, Choice of S Corporation Status
- Terminate S Corporation Status
- Revoke S Corporation Status
- Cease to Qualify
- Permitted Tax Year

COOPERATIVE CORPORATION

Three or more natural persons, at least 19 years of age, may act as incorporators of a Cooperative Corporation. Alaska Statute 10.15.350 sets out the requirements of the Articles of Incorporation. Cooperative corporations are required to file a corporate report every two years. Failure to file the report will result in involuntary dissolution of the corporation.

PROFESSIONAL CORPORATION

One or more persons, each of whom is licensed to render a professional service in Alaska, may incorporate a professional corporation.

The articles must meet the requirements for business corporations and must include the following:

The name of the profession to be practiced by the corporation

The names and addresses of all original shareholders, directors and officers

The address where the professional corporation will have its offices

A certificate from the regulatory board of the professions involved must be filed with the Articles of Incorporation certifying that each of the incorporators, directors, and shareholders are licensed to practice the profession. Professional corporations are required to file a biennial report and to pay the reporting fee every two years.



REGISTRING YOUR BUSINESS NAME

REGISTRATION OF CORPORATE NAME

A Corporation organized and existing under the laws of any state or territory of the United States may register its corporate name. The registration expires on December 31st of the calendar year in which it is filed. The registration is renewable. A Certificate of Good Standing or Compliance from the state of domicile must accompany the application.

REGISTRATION OF NAME OF UNINCORPORATED BUSINESS

Any company conducting business in Alaska may register its business name. The name may be registered for a period of five years, and the registration is renewable.

WHEN YOU APPLY TO REGISTER YOUR NAME

All corporate, reserved, and registered corporate and business names are checked for availability. A name that is the same as, (or deceptively similar to) a name already on file cannot be accepted for filing.

Business and corporate names may be reserved for 120 days if they fall into one of the categories listed below:

1. A domestic corporation intending to change its name
2. A foreign corporation intending to make application for a Certificate of Authority to transact business in the state
3. A person intending to incorporate under Title 10 of the Alaska Statutes
4. A foreign corporation authorized to transact business in the state and intending to change its name
5. A person intending to organize a foreign corporation and to have it apply for a Certificate of Authority to transact business in the state
6. A person intending to organize a business which is not incorporated

RESERVING A NAME

Completing an “Application for Reservation of Name Form” may reserve a name. Once the reserved name expires, it may not be renewed.

TRADEMARKS AND SERVICEMARKS

TRADEMARKS

A trademark is the brand by which we identify goods of a particular manufacturer or distributor. For example, “Kodak” identifies a camera made by a particular manufacturer.

While a trademark is usually a word or words, it may also be a name, emblem, symbol, slogan, or other device, as long as it serves to identify goods from a particular source.

The value of a trademark to its owner lies in the goodwill attached to it or in the fact that the consumer will ask for a “Kodak” with the expectation of receiving the same quality of product which he or she has formerly purchased under that name.

There are 52 different classifications in which trademarks can be registered. Each classification includes various commercial goods that are clearly distinct from each other. The same word or name may be trademarked in several different classes without the multiple use being confusing to consumers. Trademark names are not compared to corporate, registered, or reserved names. Registration of Trademark is made by filing an Application for Registration of Trademark with the Corporations Section. The filing fee is \$10.00 and registration is good for 10 years. The registration is renewable.

SERVICEMARKS

A servicemark is a mark used in the sale or advertising of services to identify the services of one person and distinguish them from the services of others. The Alaska Statutes do not provide for the registration of servicemarks, and they may not be registered under the trademark law.

CONTACT

Alaska Department of Commerce, Community, and Economic Development
Division of Corporations, Business and Professional Licensing
PO Box 110806
Juneau, AK 99811-0806
Phone: (907) 465-2530
Fax: (907) 465-2974
Web Site: www.corporations.alaska.gov

FOREIGN CORPORATIONS DOING BUSINESS IN ALASKA

Alaska Statute 10.06.705 requires that corporations outside of Alaska obtain a Certificate of Authority before doing business in Alaska. “Doing business” is not clearly defined in the law, and each situation calls for a separate analysis of whether the corporation or its local agents have insinuated themselves into a “continuous course of business” inside Alaska or with Alaskans sufficient to justify being governed by Alaska laws.

The Corporations Section does not provide legal counsel, and it is advisable that private legal counsel be sought to determine whether a corporation needs to qualify in Alaska.

EXCEPTIONS

The law sets forth clear exceptions to the registration requirement. (*AS 10.06.718. Activities not Constituting Transacting Business in This State.*) Without excluding other activities that may not constitute transacting business in this state, a foreign corporation is not considered to be transacting business in this state, unless any one or more of the following activities occur:

1. Maintaining, defending, or settling an action, suit, or administrative or arbitration proceeding, or the settlement of claims or disputes
2. Holding meetings of directors or shareholders of the corporation, or carrying on other activities concerning the internal affairs of the corporation.
3. Maintaining bank accounts
4. Maintaining an office or agency for the transfer, exchange, and registration of securities of the corporation, or appointing and maintaining a trustee or depository for the securities of the corporation
5. Making sales through independent contractors
6. Soliciting or procuring orders by mail, through employees, agents, or otherwise, if the orders require acceptances outside the state before becoming binding contracts
7. Creating, as a borrower or lender, or acquiring indebtedness or mortgages or other security interests in real or personal property
8. Securing or collecting debts, or enforcing rights in property securing debts
9. Transacting business in interstate commerce
10. Conducting an isolated transaction completed within a period of 30 days, and not in the course of a number of repeated transactions of like nature.

To apply for a Certificate of Authority to do business in Alaska, an original and an exact copy of the application and a form appointing the Commissioner of the Alaska Department of Commerce, Community, and Economic Development agent for service of process fee, together with a Certificate of Good Standing from the state of domicile, must be submitted. There is a filing fee and a biennial corporate tax. You may request an application for Certificate of Authority from the Corporations Section.

II. LAWS AND GUIDELINES

If you intend to employ anyone, you need to understand labor laws. You may have made the decision that your licensees are going to be independent contractors, and you may have hoped that your labor decisions were over.

These guidelines are intended to help you make choices about your office, but not to substitute for the advice of your CPA or attorney. You may also contact the Department of Labor to ensure compliance with state and federal labor laws.

Alaska labor laws are patterned after federal labor laws. Alaska's minimum hourly wage is above the federal minimum. Standard work-day and week, manpower training programs, laws pertaining to public contracts, industrial safety regulations, child labor laws, equal work, and discrimination in employment are either modeled after or closely resemble federal regulations.



LABOR LAWS

ARE YOU AN EMPLOYER?

An employer is a person or organization for whom a worker performs a service as an employee. Usually, the employer gives the worker the tools and places to work and has the right to fire the worker. A person or organization paying wages to a former employee after the work ends is still an employer.

Specific definitions of employers apply for income and FUTA tax purposes. See the Internal Revenue Service Circular E, Employer Tax Guide for details.

WHO ARE EMPLOYEES?

Employees can be defined either under common law or under special statutes for special purposes.

If you, the employer, can control what will be done and how it will be done, anyone who performs services is an employee. This is so even if you give the employee freedom of action.

You have the legal right to control the method and result of the services. Also see Statutory Employees in the Internal Revenue Service Circular E, Employer Tax Guide.

Generally, people who are in business for themselves are not employees. For example, doctors, lawyers, veterinarians, construction contractors and others in an independent trade in which they offer their services to the public are usually not employees. Also see Statutory Non-employees in the Internal Revenue Service Circular E, Employer Tax Guide.

If an employer/employee relationship exists, it does not matter what it is called. The employee may be called a partner, agent, or independent contractor. It also does not matter how payments are measured or paid, what they are called, or whether the employee works full or part-time.

Whether an employer/employee relationship exists under common law rules will be determined, when there is any doubt, by the facts in each case.

If you have good reason for treating a worker other than as an employee, you will not be liable for employment taxes on the payments to that worker. To get this relief, you must file all required federal tax returns, including information returns (*Form 1099-MISC*), on a basis consistent with your treatment of the worker. You (or your predecessor) must not have treated any worker holding a substantially similar position as an employee for any period after 1977. (*See Rev. Proc. 85-18. 1985-1 C.B. 518*)

STATUTORY EMPLOYEES

If someone who works for you is not an employee under the common law rules explained above, do not withhold federal income tax from his or her pay. See IRS Circular E, Employee Tax Guide to test if your worker is an employee. If you want the IRS to determine whether a worker is an employee, file FORM SS-8, Determination of Employee Work Status for Purposes of Federal Employment Taxes and Income Tax Withholding.

STATUTORY NON-EMPLOYEES

Direct sellers and qualified real estate licensees are by law considered non-employees. They are treated as self-employed for income and employment tax purposes. (*See Pub. 937 for details on these two groups*).

TREATING EMPLOYEES AS NON-EMPLOYEES

You will be liable for employee income tax, social security and Medicare taxes, if you don't deduct and withhold these taxes because you consider an employee as a non-employee. (*See Internal Revenue Code section 3509 for details*).

UNEMPLOYMENT INSURANCE

The Unemployment Insurance (UI) program is a federal/state system designed to provide partial wage loss compensation to workers who have lost their jobs but are able, available, and willing to work. Benefits are based on wages paid in covered employment during the worker's base period, consisting of the first four of the last five completed calendar quarters immediately preceding the quarter in which the claim for benefits is filed.

Individuals, companies, and organizations employing one or more workers for any part of a day within a calendar year are liable for contributions (taxes) under the Alaska Employment Security Act. Sole proprietors and partners are not covered and may not elect coverage.

UNEMPLOYMENT PROGRAM FUNDING

Each state is responsible for financing its benefit costs. In Alaska, the employer pays the main share of the tax, but the employee also contributes. Employers are required to withhold the employee's share from earnings. The total tax is then submitted by the employer at the end of the calendar quarter. Employers are held liable if they fail to withhold the tax.

An employer who purchases a business must cover any unpaid taxes or produce a receipt from the previous owner showing that all required Contribution Reports have been filed and taxes have been paid. If the purchaser fails to withhold purchase money within ten days, the purchaser or successor is personally liable for the unpaid tax of the former owner. The taxable wage base is 75% of the average annual wages earned in Alaska for the 12 month period ending the proceeding June 30th.

FEDERAL UNEMPLOYMENT TAX ACT (FUTA)

Each employer in Alaska is subject to the Federal Unemployment Tax Act (FUTA) and must submit Form 940 and the proper remittance to the Internal Revenue Service. These funds are used to cover the administrative cost of the State Unemployment Insurance Program (UI). An employer paying UI tax to the state is entitled to a credit of a portion of FUTA tax due. The full credit cannot be claimed unless timely payment has been made to the state. Federal law establishes the amount of FUTA and the taxable wage base. Information and tax forms may be obtained from the Internal Revenue Service.

If contributions are not paid when due, the amount remaining unpaid bears interest at the rate of 12% per annum. Interest will accrue until payment is received for the complete balance of contribution, interest, and penalty due. The Employment Security Act also provides penalties for failure to file reports, for nonpayment of contributions, and for failure to pay the employee's share. A registration form and more specific tax information on the Unemployment Insurance Program may be obtained by writing to Alaska Department of Labor.



EMPLOYER RESPONSIBILITIES

EMPLOYER MUST REGISTER

Each employer must file a registration form (Form 1002) with the Employment Security Division at the start of business. A tax account number will be assigned to those employers determined to be covered for UI purposes. This number must be used on any correspondence with the state Department of Labor.

EMPLOYER MUST POST NOTICE TO EMPLOYEES

Once determined covered, each employer will be furnished a “Notice to Employees” which must be posted in a place convenient for all employees to read. This notice is to advise employees they are insured workers under the Alaska Employment Security Act.

EMPLOYER MUST MAINTAIN PAYROLL RECORDS

Employers must establish, maintain, and preserve payroll records for five years for each employee. Records must be open to the Department of Labor for inspection and may be copied at any reasonable time. Information obtained from the employing unit will be kept confidential.

EMPLOYER MUST FILE QUARTERLY REPORTS

Contribution Reports and Wage Schedules are required quarterly and are due on the last day of the month following the calendar quarter. About two weeks prior to the close of each quarter, contribution forms (Form 1004) are mailed to all employers. But whether or not you receive forms by mail, you must file the reports.

1. Contribution Report, Form 1004, is used to collect the employee and employer’s quarterly unemployment tax. Employers will compute taxable wages and taxes due and send payment along with the report.
2. Wage Schedule is used to collect wage information for each worker employed at any time during the quarter. The employer must submit the social security number, name, total wages paid, occupational title or code, and physical location code.

EMPLOYER MUST REPORT CHANGES IN OWNERSHIP

Employers must notify the Department of Labor if they terminate business or cease employing workers. If the business is to be sold or leased, the name and address of the successor must be provided, as well as the date of the transaction.

CONTACT

Alaska Department of Labor
Employment Security Tax
P.O. Box 25509
Juneau, Alaska 99802
<http://www.labor.state.ak.us/>

FIELD TAX OFFICES

Alaska Department of Labor
Anchorage
3301 Eagle Street, Suite 206
P.O. Box 107023
Anchorage, Alaska 99501-7023
Phone (907) 269-4850
Fax (907) 269-4845

Alaska Department of Labor
Juneau
P.O. Box 25509
1111 W. 8th Street, Suite 201
Juneau, Alaska 99802-5509
Phone (907) 465-2787
Fax (907) 465-2374

Alaska Department of Labor
Fairbanks
675 7th Avenue, Station D
Fairbanks, Alaska 99701
Phone (907) 451-3110
Fax (907) 451-2919

Alaska Department of Labor
Wasilla
877 Commercial Drive
Wasilla, AK 99654
Phone (907) 373-2682
Fax (907) 373-2683

Alaska Department of Labor
Kenai
11312 Kenai Spur Rd. Ste #2
Kenai, AK 99611
Phone (907) 283-4478
Fax (907) 283-5152

WAGE & HOUR

Alaska law requires an employer in this state to pay wages or compensation with currency of the United States. This may be in the form of currency, negotiable checks, drafts, or money orders payable upon presentation without discount, by the bank or depository, inside the state. Upon termination of an employee, all wages and other compensation are due immediately and must be paid within three working days.

OVERTIME PAYMENT

If an employee works more than 40 hours straight time a week or eight hours a day, he/she shall be paid for the overtime at a rate of 1.5 times the regular rate of pay. This provision is included in all contracts of employment. It does not apply to businesses employing less than four employees, or to occupations such as real estate sales.

MINIMUM WAGE

By law, the Alaska wage rate is 50 cents per hour higher than the prevailing federal minimum wage. There is an exemption for commissioned sales.

EMPLOYMENT OF MINORS

No minors under the age of 14 may be employed in a real estate office. A minor under 16 may not work more than 23 hours a week, nine hours a day (including school attendance), before 5:00 a.m. or after 9:00 p.m., while school is in session. A minor under 18 may not work more than six days a week. Certain exceptions may be at the discretion of the Commissioner of the Department of Labor. Federal standards may be more restrictive. For exact requirements, check with U.S. Department of Labor.

DISCRIMINATION IN EMPLOYMENT

No employer, employee, labor organization, employment agency, or other persons may discriminate because of race, religion, color, or national origin, or because of age, physical handicap, sex, marital status, pregnancy, or parenthood when the reasonable demands of the position do not require distinction on the basis of age, physical handicap, sex, marital status, changes in marital status, pregnancy, or parenthood.

CONTACT

ALASKA DEPARTMENT OF LABOR

Labor Standards and Safety Division

Wage and Hour Administration

<http://www.labor.state.ak.us/lss/whfaq.htm>

Anchorage Office
3301 Eagle Street, Suite 305
P.O. Box 107021
Anchorage, Alaska 99510
Phone (907) 269-4940
Fax (907) 269-3723

Juneau Office
1111 W. 8th Street, Suite 304
P.O. Box 21149
Juneau, Alaska 99802
Phone (907) 465-4855
Fax (907) 465-6012

Fairbanks Office
Regional State Office Building
675 7th Avenue, Station I
Fairbanks, Alaska 99701
Phone (907) 451-2888
Fax (907) 465-2928

WORKERS' COMPENSATION

An employer is liable to employees for full medical treatment that results from injury or illness incurred on the job, whether or not the employee was at fault. In the event of disability, the employer is liable for compensation equal to 80% of the employee's net spendable weekly wage, not to exceed \$700 a week. The duration of the claim is dependent on the disability.

The Alaska Workers' Compensation Board uses what is called the "relative-nature-of-the-work" test in determining employer-employee relationship for workers' compensation purposes. This is not the same test used for Unemployment Insurance purposes for IRS. This test compares the work of the employee against the work of the employer. A person may be an independent contractor for some purposes, but not for workers compensation. Except for executive officers of a corporation, employees may not waive their rights to workers' compensation benefits.

An employer shall either insure for liability with a private insurance company or association, or shall provide satisfactory proof to the Workers' Compensation Board of ability to pay direct compensation. Private insurance companies operating in the state use the rates developed by the National Council on Compensation Insurance and approved by Alaska's Division of Insurance. The rate schedule ranges from a few cents to over \$50 per \$100 payroll, depending upon type of employment. For further information regarding compensation benefits, contact the Workers' Compensation Division, Alaska Department of Labor. For information regarding insurance premium rates, contact the Division of Insurance, Department of Commerce, Community, and Economic Development.

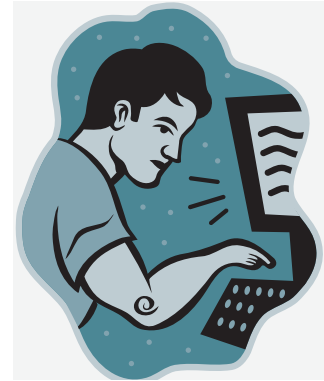
CONTACT

Workers' Compensation Division
Alaska Department of Labor
P.O. Box 25512
Juneau, Alaska 99802-5512
Phone: 907-465-2790
Fax: 907-465-2797
<http://labor.state.ak.us/wc/home.htm>

Division of Insurance
Department of Commerce Community and Economic Development
550 W. 7th Avenue, Suite 1510
Anchorage, AK 99501
Phone: 907-269-7900
Fax: 907-269-7910

ALASKA OCCUPATIONAL SAFETY & HEALTH

The Department of Labor's Occupational Safety and Health Section provides services to assist employers in providing and maintaining safe and healthful places of employment. Upon request, the division will conduct consultative inspections of workplaces to help employers identify work practices and conditions that may be hazardous to employee safety and health.



Citations are not issued for safety and health violations observed during a consultative inspection unless an imminent danger situation or serious violation is discovered which the employer does not immediately abate.

The Section also enforces the State's Occupational Safety and Health Standards and unlike a consultative inspection requested by an employer as described above, citations may be issued and monetary penalties assessed for any safety and health violations observed during an enforcement inspection.

A listing of the safety and health codes, as well as copies of the Alaska standards, may be obtained from the Section. Employers are required to post the Section's posters "Safety and Health Protection on the Job" at every work site.

CONTACT

Alaska Occupational Safety and Health (AKOSH)
Alaska Department of Labor
3301 Eagle Street, Suite 305
Anchorage, AK 99510
Phone (907) 269-4940
Fax (907) 269-3723
<http://www.labor.state.ak.us/lss/oshhome.htm>

FAIR HOUSING

It is probably safe to say that all real estate licensees are aware of fair housing laws. It is the broker's responsibility to ensure that all licensees affiliated with the brokerage know the company's policies on fair housing.

In Title VIII of the Civil Rights Act of 1968, (The Fair Housing Law), Congress declared a national policy of providing fair housing throughout the United States. This law makes discrimination based on race, color, religion, sex or national origin illegal in connection with the sale or rental of most housing and any vacant land offered for residential construction.

The federal fair housing law clearly forbids, on the basis of discriminatory considerations:

Refusal to rent or sell property or to negotiate the sale of it for discriminatory reasons.

Price adjustment (varying the terms of property lease or sale or the nature of brokering services for discriminatory reasons)

Biased advertising (advertising in such a way that protected groups are excluded from consideration as tenants or buyers)

Misrepresenting availability (misleading minority customers regarding the availability of properties for sale or lease)

Refusing loans (refusing home loans or adjusting home loan conditions on a discriminatory basis)

Restricting professional involvement (restricting minority membership or participation in multiple listing services or other professional brokering groups or organizations).

The most important change, from a real estate licensee's viewpoint, is the addition of two new basis of prohibited discrimination--handicap and "familial status".

EXEMPTIONS TO THE ACT

Exemptions from the requirements of the Fair Housing Act still exist, but they are extremely limited.

A **LANDLORD** is exempt if the rental building contains four or fewer units and the landlord personally occupies one of them.

SALES OF HOUSING are exempt if the seller owns no more than three properties at a time, and there is no listing with a real estate licensee and no publication, posting, or mailing of any advertisement indicating any improper discrimination.

Even if a transaction is exempt from the Fair Housing Act, any sale or rental of real estate where there is racial discrimination violates the Civil Rights Act of 1866.

STATE AND LOCAL FAIR HOUSING LAWS

State of Alaska law has provisions to protect the rights of individuals to be treated fairly, regardless of race, sex, or national origin.

Alaska law forbids housing discrimination, protecting the same individuals who are protected under federal law. The Alaska State Commission for Human Rights is responsible for enforcing investigating and enforcing both state and federal anti-discrimination laws within Alaska, under a work-sharing agreement with the U.S. Department of Housing and Urban Development (HUD).

Many municipalities and local governments also have their own fair housing ordinances, which are investigated and enforced on a local level.



CONTACT

Alaska State Commission for Human Rights

800 A Street, Suite 204

Anchorage, AK 99501-3669

<http://gov.state.ak.us/aschr/>

Anchorage Area 907-274-4692

Anchorage Area TTY/TDD 907-276-3177

Toll-Free Complaint Hot Line (in-state only) 800-478-4692

TTY/TDD Toll-Free Complaint Hot Line (in-state only) 800-478-3177

U.S. Equal Opportunity Commission

<http://www.eeoc.gov/>

U.S. Department of Housing and Urban Development (HUD)

<http://www.hud.gov>

III. SETTING UP YOUR OFFICE

WHO WILL YOU HIRE?

EMPLOYEE OR INDEPENDENT CONTRACTOR

As a real estate broker, you may employ licensed salespersons as either independent contractors or employees, depending on the relationship you choose to establish with them. Their status as an independent contractor or an employee is important, because it affects how they:

- Receive compensation,
- Pay and report taxes, and
- Comply with office policies and procedures.

PUT YOUR INTENTIONS IN WRITING

For everyone's protection, it is a good idea to establish the desired status in the employment contract with your salespeople. Alaska law does not require an employment contract, but it is a good idea. It sets out everyone's intentions and clearly states the agreement between you and your employees. Without one, it is difficult to later prove exactly what your agreement entailed.

LIVE BY YOUR CONTRACT

Be careful that your daily practices and activities follow the terms and conditions of the contract. To the courts, actions speak louder than words. Your practices and activities will weigh more heavily in determining your relationship with salespeople than will the language in your contract.

In reviewing the contract, look for these issues to help you determine whether your sales persons are independent contractors or employees.

How are your sales people compensated?

Most employees receive wages based on the number of hours they work. In contrast, independent contractors receive compensation based on their production.

How do your sales people pay and report taxes?

A broker withholds taxes from an employee's paycheck and forwards those taxes to the government. Independent contractors are solely responsible for paying their own taxes.

Do you have the right to control their activities?

A broker may exercise control over the activities of an employee or a statutory independent contractor without jeopardizing the salesperson's license.

REGISTERING YOUR OFFICE



A broker must have an office, and must register that office with the Commission. A broker must post a sign prominently showing the name of the business. (*AS 08.88.291, AS 08.88.381*)

You Must Register Your Office

To register an office with the Commission, a broker must complete an office registration form.

If you plan to have any branch offices, they must also be registered with the Commission. The branch office must have an associate broker in charge, and the branch office must be that associate broker's principal place of business. The name and license number of the associate broker in charge and the name and license numbers of all licensees who will work out of the branch office must be reported to the Commission. (*12 AAC 64.120*)

You Must Register Your Business Name

A broker must report the business name to the Commission. If the registered business name is different from the corporate identity of the business, the broker must submit a corporate affidavit documenting the relationship of the brokerage to the corporation. The name a broker registers with the Commission must be separate and distinct from all other active brokers' registered business names.

To register a name that is protected through registration with the Division of Corporations, Business and Professional Licensing, Corporations Section, a broker must submit proof of legal right to that name. (*12 AAC 64.112*).

You Must Establish a Trust Account

Every Alaska broker must have a trust account, whether his/her business is in commercial or residential sales, property management or community association management. There are some distinct requirements with regard to some areas of practice. Please refer to the Trust Account section of this manual for a complete discussion of requirements.

In each case, a trust account must be completely separate from the brokerage operating account, and used only to safeguard other people's money temporarily entrusted to the broker in connection with a real estate transaction.

WHO WILL YOUR OFFICE REPRESENT?

New legislation, effective January 1, 2005, gives your brokerage a number of ways to represent clients and customers. You will have to decide what alternatives of offering services your office will allow, and then structure your office policy to match. Once you decide which types of relationships will be acceptable, you must convey the decision to the licensees that work in your office and write a policy guideline in order to comply with the legislative mandate in *AS 08.88.600-695*.

You may choose to represent the seller/lessor.

A broker or licensee who signs a listing agreement with a property owner contractually agrees to represent that owner. You may also assist a buyer/lessee when selling or leasing that property without offering that buyer/lessee representation.

You may choose to represent the buyer/lessee.

A broker or licensee may choose to offer representation to a buyer. Some choose to only represent buyers as a specialty field. It is possible to represent a buyer/lessee and to assist a seller/lessor in the same transaction without offering representation to that seller/lessor. When establishing a relationship with a buyer, it is strongly advised to have personal service contracts signed establishing each party's rights and ensure that you are paid for your work.

You or your licensee may assist both the buyer/lessee and the seller/lessor.

If you (or your licensee) are representing a buyer/lessee who wants to purchase or lease another one of your client's properties, with written pre-authorization, you may move into a "neutral licensee" status. This allows you to offer assistance to both sides of the transaction while limiting your ability to offer representation. Statutes and regulations are very specific on how to enter into this relationship. If you have a longstanding or ongoing relationship with one of the parties, or if you are related to one of the parties, or if you have a financial interest in the property, it may be impossible not to violate the duties of a neutral licensee as described in *AS 08.88.645*.

You may choose to represent both parties to a transaction in your office.

You may represent both a buyer/lessee and a seller/lessor in your office by designating the licensee who will be representing each party. You may also elect to designate yourself to represent one of the parties. When brokers designate themselves to represent one side, they will have to appoint an associate broker to oversee the file for the licensee representing the opposing side.

Protect yourself and your clients by studying the license laws carefully.

A thorough understanding of the changes in *Alaska Statute 08.88.600-695* will tell you what you can and can't do at different points in your relationship with a client or customer and when to have relationship disclosures signed. Operating within the specifications in the legislation is your safety zone, deviating from it opens you up to unwanted liability.

Alaska law requires written disclosure of licensee relationships.

When entering into a contractual relationship, and before offering specific assistance to a person, you must give that person a copy of the consumer pamphlet produced under *AS 08.88.685(b)(2)* and obtain from that person a signed document disclosing your relationship with that person. Failure to follow this guideline may result in disciplinary action against your license, expensive civil litigation, and possible costly court judgments.

ESTABLISHING TRUST ACCOUNTS

Alaska law requires that any Alaska broker maintain a trust account for the safekeeping of other people's money collected in the course of real estate transactions. A trust account is a separate account from any of the broker's operating accounts.



A trust account must:

- Be a demand account,
- Be held in an Alaska bank, and
- Be identified by the words "trust" or "trustee" in the name of the account.

All trust accounts must be reported to the Commission. If you add or delete a trust account, or if you move a trust account from one bank to another, you must inform the Commission. Trust account changes should be reported in writing, on your company letterhead, and you should sign the notice. There is no charge for changes in trust account information.

Trust accounts may not be placed in a credit union, because credit union accounts take the form of shares owned by the depositor. (*12 AAC 64.180*).

Demand savings trust accounts or interest-bearing trust accounts are lawful, as long as the broker discloses in writing to the trustor that the account is interest-bearing, and discloses the rate of interest. (*12 AAC 64.210*). The interest may not be retained by the broker, but is the property of the trustor. A broker may deposit up to \$100 of his own money into the trust account to cover fees on the account. Many banks do not charge fees on trust accounts, or are willing to charge those fees to the operating account. If you must use this method of fee payment, a separate ledger must be maintained to account for these personal funds. (*12 AAC 64.180(d)*).

A broker may designate signatories of choice on the trust account, such as bookkeepers, associate brokers, or secretaries. But the broker is still the trustee of the account, and is responsible for the money. Any actions taken by signatories with regard to the trust account are the direct responsibility of the broker. (*12 AAC 64.180(c)*).

A broker may choose to have one trust account or many. But each trust account must be reported to the Commission by account number, bank and branch. (*12 AAC 64.180(b)*).

A broker's trust account records must include:

- Deposit slips showing date
- Transaction number
- Amount of deposit and trustor's name
- All checks and check records for the account
- Showing date, payee and transaction number (voided checks should also be retained.)
- A ledger record of each transaction showing the transaction number
- All deposits to the trust account for that transaction and all withdrawals identified by check number and payee (*12 AAC 64.220(b)*).



RECORDKEEPING

The broker must keep the business records for the brokerage. There is no way to avoid this responsibility. As broker, you need to know the requirements of the law, and understand how your office complies with them.

A Broker Must:

Keep a complete record of all real estate transactions processed through the office for at least three years;

- Prepare or obtain a closing statement accounting for all money receipts and disbursements in each transaction;
- Maintain a trust account for safekeeping of other people's money;
- Make trust account records available to the Commission for audit. (*AS 08.88.351*)

The Commission may inspect records of the brokerage at any time. Normally, the auditor will give 72 hours notice. Inspections will be scheduled during normal business hours (between 8 a.m. and 5 p.m. Monday through Friday) unless otherwise agreed. The Commission may inspect listing agreements, purchase agreements, trust account deposit and disbursement records, closing statements, and records of broker or other licensee's communications regarding transactions. (*12 AAC 64.135(a)*).

The Commission may order a trust account audit without prior notice. In this case, the auditor must present the notice during normal business hours. If the inspection would create a grave hardship at the time the auditor appears, you may request a 24-hour delay, but the auditor will seal the records for the duration of the delay. (*12 AAC 64.135 (b)*).

Each transaction must be assigned a transaction number, and a separate ledger sheet must be maintained for each transaction.

There must be a ledger sheet for EVERY transaction, even if no deposit is made to the broker's trust account for that transaction. Examples are:

- A co-brokerage situation, in which the other broker maintains the funds, or
- A property management transaction, in which funds are collected and sent directly to the property owner.

Transaction numbers for property management accounts may be assigned one per property or one per landlord.

ADVERTISING YOUR BUSINESS

Advertising is a very public part of a broker's business. Since advertising is intended to directly influence and persuade the public, the Commission takes an active interest in exactly "what you say and how you say it" when it comes to your company's ads.

Every sales transaction must be conducted through your office, and every ad must include your business name.

OPERATING YOUR OFFICE

The law requires that you:

- Establish a written policy that identifies and describes the relationships in which the broker and real estate licensees who work for the broker may engage with a seller, buyer, lessor or lessee.
- Direct and supervise all real estate activities of your office
- Hire, fire and supervise licensed affiliates
- Pay licensees for the work they do

YOU MUST MAKE EMPLOYMENT DECISIONS

Whether running your own business or employed as broker for a corporation, you are responsible for hiring and firing of licensed personnel. *12 AAC 64.065(b)(1), 12 AAC 64.077.*

YOU MUST SUPERVISE LICENSEES

Part of your responsibility as broker is to supervise the real estate activities of all licensees affiliated with your office. However, you will not be held responsible for an individual licensee's conduct unless you have knowledge of and agree to it ahead of time, or you condone it by remaining silent once you learn of illegal or irresponsible conduct. *AS 08.88.071(c).*

You are responsible for supervising the activities of the licensees in the office and for reviewing all agreements relevant to the transactions they produce. This includes responsibility for listings, purchase agreements, buyer agency agreements, leases and rental agreements, addenda, and occupancy agreements. A licensee must process all transactions through his/her broker, and all money collected by licensees must be turned over to the broker immediately. The broker must account for all moneys received. *AS 08.88.331, 08.88.351(a)(2).* Transactions in which the licensee is a principal must also be processed through the broker. *AS 08.88.331.*

YOU MUST SIGN APPLICATIONS

Any applications to the Commission must be signed by you, as the broker of the company. You must also sign transfers and office change forms. In the case of a branch office, you, the broker, and the associate broker you have placed in charge of the branch office, must sign forms and applications. *12 AAC 64.077(b).*

If you notify the Commission of your designation of a broker or associate broker to oversee office operations in your absence, that designee may sign license applications during the period of your absence. This will allow for any hiring or firing which must be done while you are gone. *12 AAC 64.077 (c).*

YOU MUST CONTRACT FOR SERVICES

When you contract with consumers to perform work for them, you earn your pay when the terms of the personal service contract are fulfilled. By definition, a personal service contract is an agreement in which a broker agrees to perform a service for a fee. The fee may be a specific dollar amount or a percentage of the property's market value, sale price, or rental fee. *AS 08.88.361, 12 AAC 64.990.*

When you sign a contract with a consumer, you are also contracting on behalf of your licensed affiliates. When a consumer contracts with your brokerage, they are justified in expecting the terms of the contract to apply to each licensee in your office.

YOU MUST PAY LICENSED PERSONNEL

Licensees may accept payment for licensed activity only from the broker who employs them. It is your responsibility to make fair and timely payment of any commissions, salaries, referral fees or other compensation to which the licensee is entitled. *12 AAC 64.140(2)*.

The Alaska Supreme Court stated in *Calvo v Calhoon* that the statutes imply a relationship of employer/employee between the broker and licensees in the office. If a broker chooses to treat his/her licensees as independent contractors, he/she must comply with the provisions of the Internal Revenue Service to maintain that status, and structure the office procedures and accounting accordingly.



ESTABLISH A POLICY AND PROCEDURE MANUAL

Pursuant to AS 08.88.685 and 12 AAC 64.117, a broker shall adopt a written policy. This helps to create a basic understanding between you and your associates about what is expected and what is discretionary. Putting things in writing helps to clarify the rules of your office, especially when it comes to potential problem areas such as agency representation or multiple offers.

Your employment agreement with your affiliated licensees should also be explained in your policy and procedures manual. You will want an employment contract to establish the rights and responsibilities of employer, employees and the company. Your

policy and procedures manual can help explain and clarify the employment agreement, and will establish the way you meet your commitments to your employees, and exactly what you expect in return. This can help prevent unpleasant and expensive disagreements later. (*See the Policy & Procedure Checklist on page 40*).

ERRORS AND OMISSIONS INSURANCE

Errors and omissions insurance for real estate licensee's is comparable to medical malpractice insurance for physicians. Both policies cover professional liability for a negligent act or failure to act by state-licensed specialists with specific skills and training. Both policies are designed to protect the professional from the financial consequences of claims brought by consumers of their services. Even when those services are performed with the utmost skill, a consumer may still be displeased with the outcome and file suit. Real estate errors and omissions insurance is designed to protect the real estate professional from financial loss in such a suit. Once the insurer is notified of a claim, the insurance company has the responsibility of defending the claim as well as paying any settlement or judgment against the insured professional. Whether or not to purchase E&O insurance is another business decision every broker must make.

USE YOUR BUSINESS NAME

12 AAC 64.130(8) states that advertisements to buy, sell or exchange real estate must include the broker's registered business name.

PERSONALLY OWNED PROPERTY

The phrasing in *AS 08.88.331* is precise—a salesman or associate broker may perform activity for which a real estate license is required **ONLY** through his/her broker's office. This provision applies to all real estate that is advertised to the public, including property that is owned by a licensee.

IV. INTERACTING WITH THE REAL ESTATE COMMISSION

LICENSING REQUIREMENTS

Alaska law requires that real estate licensees renew their licenses every two years, by January 31 of even-numbered years. But what happens if you don't?

For most licensees, not renewing a license means that as of February 1st, the license lapses and the individual is no longer licensed, and can no longer perform any activities for which a license is required.

A lapsed license may be reinstated without re-testing for two years following the date the license lapses by applying for reinstatement, providing proof of completion of continuing education and payment of fees.

WHAT IF MY BROKER LICENSE LAPSES?

If your broker license lapses, the situation is more complicated. Since an office cannot exist as a real estate brokerage without a broker, allowing your broker license to lapse means that your office is closed. Once your office is closed, you must open an office and qualify to reinstate your license.

For a broker with licenses, it's even worse. If the broker's license lapses and the office closes, each licensee who was affiliated with that office must be suspended for lack of an employing broker. A broker may reinstate without re-testing for two years following the date the license lapses by applying for reinstatement, providing proof of completion of continuing education and opening an office. Then, each licensee who was suspended must be reinstated as well.

As a broker, you must ensure that you renew your license early to avoid these unpleasant consequences of a lapsed license. You must also ensure that you have a current license posted for each affiliated licensee. If you permit a licensee to work after allowing his/her license to lapse, you are employing an unlicensed person to perform real estate activities, and could be prosecuted for violation of the license law.

Keep the Commission informed of the following changes:

- Closing your office
- Transferring ownership
- Transferring brokerage records



CHANGES IN PERSONAL AND OFFICE INFORMATION

Changes are a part of life. But when there are changes in your life that effects your business, it is your responsibility to notify the Commission. You must file information changes with the Commission whenever there are:

CHANGES IN PERSONAL INFORMATION

Address of Record Change

The personal address you have given the Commission as your address of record is where we send any Commission correspondence, including your renewal notice. Alaska law

requires that all licensees keep this information current, and there is no charge for filing a change of personal address; however, the change request must be in writing and include the licensee's signature.

Name Change

If you legally change your name, notify the Commission.

CHANGES IN OFFICE INFORMATION

Office Location

If you move your office, you must notify the Commission immediately. Use an office change form, and attach a list of all licensees affiliated with your office, since their license files must also reflect the change. See current fee schedule for office actions and appropriate fees.

Office Mailing Address

A change in the office mailing address must also be reported to the Commission immediately.

Change of Business Form

If you change the corporate status of your company, you are, in fact, closing your existing office and opening a new office.

If you form a corporation or a partnership, you are creating a new "person" under the law.

To change from a sole proprietorship to a corporation or partnership, you must submit documents to the Commission to close your old office and open a new one. You must also file the partnership or corporate affidavit with the Commission, and register with the Corporations Section of the Department of Commerce, Community, and Economic Development. See current fee schedule for office actions and appropriate fees.

Opening or Closing a Branch Office

When you open or close a branch office, use the office registration form to notify the Commission. Any licensed affiliates who transfer to and from these offices must also file license application forms to effect the transfer. Any license actions must be signed by the broker, or in the case of a branch office, the broker AND the associate broker-in-charge. See current fee schedule for opening an office.



CHANGES OF LICENSEE AFFILIATIONS

When Someone Joins Your Office

When you agree to employ a NEW LICENSEE, you must sign the license application form that is awarded when the licensee passes the examination. The licensee must submit the application to the Commission, and may expect to receive the license within two weeks.

A new applicant may NOT perform any activities requiring a real estate license until a license is issued.

When a licensee wishes to TRANSFER to your office from another brokerage, the former employing broker will sign and date the license certificate, provide the licensee a photocopy of the certificate, and return the original certificate to the Commission office.

The licensee must complete a transfer form, which must be signed by both the terminating broker and you, as the new employing broker. The completed form must be submitted to the Commission with the transfer fee. The licensee can then turn over the copy of his license to you, and you may post the copy for 30 days, while the Commission issues a new license certificate assigning the licensee to your office. As soon as the new certificate comes in, it should be posted in place of the copy.

When Someone Leaves Your Office

When a licensee decides to transfer out of your office, you, as the terminating broker, must sign and date the license across the face of the certificate, and give a copy of the certificate to the licensee to take to the new employing broker. The licensee also needs your signature on a transfer application, which will also be signed by the new employing broker. Give the transfer form and the copy of the license certificate to the licensee. You must return the original license certificate to the Commission. (AS 08.88.171, 12 AAC 64.075)

If You Must Terminate a Licensee

If you find you must terminate your association with a licensee for any reason, you should inform the Commission immediately. This may be accomplished on a Broker Termination of Licensed Associate form, included with the Change of Status form. Complete and sign the form; return it to the Commission office along with the individual's license, signed and dated across the face of the certificate. If you terminate the licensee for cause, attach a letter explaining the circumstances. **There is no fee assessed for the notice of termination.**

Commission staff will put the individual's license in a suspended status until the individual submits a change of license status form, notifying the Commission of his/her employment with another broker, and pays the reinstatement or transfer fee.

CLOSING YOUR REAL ESTATE OFFICE

At some point, you may choose to stop being a broker. You may decide to give up your own business and go to work for another broker, or to terminate your employment as broker for a corporation to work for someone else.

If you make such a choice, you must return your broker license to the Commission, and apply for an associate broker license. Each licensee affiliated with your office must either transfer to another employing broker or inactivate his/her license. Your own transfer and status change cannot be completed until change applications are processed for all licensees who were affiliated with your office.

If you would like to begin work as an associate broker immediately, keep a photocopy of your broker license. Return the original with your application for an associate broker license, signed by your new employing broker. Deliver the copy of your license to the new employing broker, who will post the copy. That will permit you to work while the application for your associate broker license is being processed. (AS 08.88.171).

If you decide to close your office, here's what you need to do:

- Determine the exact date your office will close.
- Notify affiliated licensees, and sign transfer or inactivation forms for them.
- Notify your clients that your contract will end when your company closes, and that they may enter into a new listing, management agreement, or other personal service contract with a broker of their choice.
- Arrange for pending transactions to be closed by a title company, lending institution, escrow company or attorney, and obtain the principals' consent. If the company is being sold or is merging with another brokerage, the new broker may close transactions with consent of the principals.
- Remove your signs from all properties listed or managed by the firm.
- Cancel all advertising in the name of the firm, including newspaper advertising, office signs and telephone directory ads.
- Disburse all trust moneys to the appropriate parties: escrow companies, principals, or the broker acquiring the transaction.
- Notify the Commission.

To do this, you must:

- File a Closing Office Form.
- Provide a bank statement showing a zero balance in your trust account(s).
- Provide the name, address and phone number of the custodian of records, and the location where transaction records of the brokerage for the last three years may be accessed.
- Transfer and change status or inactivate your license.

TRANSFERRING OWNERSHIP

If your brokerage is a corporation or an LLC, the Commission does not require closing the office to change brokers. It is reported as a change of broker on an Office Changes form, and submitted to the Commission with a copy of the corporate minutes reflecting the appointment of the new broker. Also contact the Corporations Section of the state Department of Commerce, Community, and Economic Development for information regarding procedures for reporting transfer of ownership of a corporation.

If your brokerage is a sole proprietorship, the sale of your business requires closing of your office and opening of a new office by the acquiring broker.

TRANSFERRING BROKERAGE RECORDS

If a client hires another broker or contracts with another broker rather than renewing a contract with you, you may have questions about what to do with contracts, trust funds and records.

This is most complicated for property managers, since contracts with property owner/clients often extend over long periods of time.

If a property owner/client decides to change managers, you have no choice but to turn over the records and trust funds as instructed. If you are holding tenant security deposits in trust, you must transfer them to the new property manager or to the property owner, according to your client's instructions.

You are not in a position to decide whether or not the property owner will handle trust funds properly.

When you are no longer the property manager, you have no legal right to retain those funds.

You do, however, have a responsibility to notify the tenants what has happened to their security deposits. The best way to handle the notification is to send each tenant a notice that the property owner has engaged a new property manager, and that the security deposit has been transferred to XYZ Brokerage, where it is being held in a trust account. Provide the name, address and phone number of the new broker or property manager.

If you are required to transfer the security deposits directly to the property owner, you will notify the tenants that your contract has been terminated and that the security deposits have been turned over to the property owner. Provide the name, address and phone number of the property owner.

The records will have to be turned over as well, but you are required by law to retain a copy of the records for at least three years or to contractually ensure that the records will be available for at least three years for review by Commission auditors upon demand. If you do not personally retain the records, you must have the name, address and phone number of the record custodian, which must be provided to the Commission upon request.

THE REAL ESTATE SURETY FUND

The real estate surety fund was established by the Alaska legislature to help protect consumers from financial loss caused by real estate licensees.

WHAT A CLAIMANT MUST PROVE

To prove a claim against the surety fund, an individual must show actual loss as a result of fraud, deceit, intentional misrepresentation or conversion of trust funds on the part of a real estate licensee in a real estate transaction. The fund provides up to \$15,000 per transaction, up to a total of \$50,000 per licensee.

DEFENDING YOURSELF AGAINST SURETY FUND CLAIMS

If someone files a surety claim against you, you will be notified by Commission staff. You will be provided a copy of the claimant's statement, and will have an opportunity to respond stating whether you intend to present a defense.

If you choose to defend, you will attend a pre-hearing conference. At that conference, you and the opposing party will set a hearing date, exchange documents and witness names, set a discovery schedule, and resolve any legal questions.

CONSIDER LEGAL REPRESENTATION

A surety fund hearing is a serious matter. Claims paid against you could cost you up to \$50,000 and cause you to lose your professional license. An attorney may be helpful in determining the legal merits of the claim. He/she can assist you in preparing the relevant facts and the necessary documents for presentation at the hearing, and can question the claimant at the hearing to ensure that all relevant facts are on the record.

The Administrative Law Judge (ALJ) will make every effort to ensure that all parties understand the proceedings and have a fair opportunity to present their cases, whether or not attorneys are present.

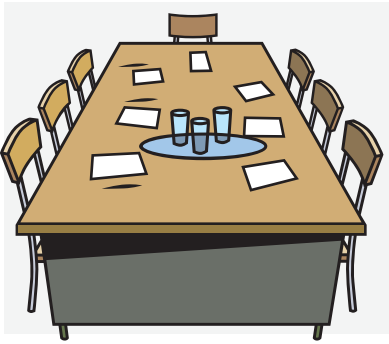
COMMUNICATING WITH THE ADMINISTRATIVE LAW JUDGE (ALJ)

The Department of Administration employs a pool of Administrative Law Judges to hear cases. The ALJ will hear your case, unless there is some reason he/she may recuse him/herself. If you have reason to believe that he/she is biased or has a conflict of interest, you can request assignment of an outside hearing officer. Although you have no automatic preemption right, the ALJ will generally reassign the case if there is a specific reason, and will always evaluate a conflict of interest question.

If you wish to communicate with the ALJ other than at the hearing, you should do so by letter, sending a copy of your correspondence to the other party. Occasionally, the ALJ will speak with one or both parties by phone regarding procedural matters. But that is generally avoided, because it can create an inference of improper communication and partiality.

PREPARING FOR THE HEARING

Before the hearing, be sure that you clearly understand what facts you will have to prove, the standard of proof the ALJ will use, the order of presentation of evidence, and your right to cross-examine witnesses and review documents. This is especially important if you choose to appear without an attorney.



PRESENTATION OF EVIDENCE

There are usually no dramatic surprises at the hearing. Nor do you generally win your case by trying to confuse the Administrative Law Judge with technical or irrelevant details. A well prepared, orderly, logical defense will not only clarify the issues for the Administrative Law Judge but will also show that you take the procedure seriously.

Although most cases are won or lost on the basis of documentary evidence and undisputed testimony, there are times when the credibility of one or both parties is an important factor. Since the hearing officer is the “fact finder” and determines the credibility of the witnesses, your manner and presentation could be as important to your case as what you actually say during the hearing.

If the initial decision is not in your favor and you determine that you wish to appeal the ALJ’s decision, you will be glad that you thoroughly prepared your case and presented it in an orderly manner. If you decide to appeal your case to the court, your orderly presentation of evidence at the hearing becomes invaluable. Since the court will review only the transcribed record you will not have the opportunity to give your explanations in person.

DOCUMENTATION

While it is not a hard and fast rule of law that the person with the most documentation wins, carefully documented files are helpful in assessing the credibility of witnesses.

THE DECISION

Once the hearing has been completed, the Administrative Law Judge will draft a written decision including findings of fact and conclusions of law. The Commission reviews the findings and conclusions and issues a final decision and order.

YOUR RIGHT TO APPEAL

Once the Commission has rendered a decision, either party may ask for reconsideration of the decision by writing directly to the Commission.

This request for reconsideration should specifically list all factual or legal conclusions you believe were made in error, and citations to the testimony or statutes, which support your argument.

If your request for reconsideration is denied, you may appeal the decision to the Superior Court.

The case is treated as an administrative appeal. You are not generally permitted to add documents or testimony to the record. (This is another reason to make sure that all the testimony and documents relevant to your case are presented at the time of the initial hearing.)

The Alaska Real Estate Surety Fund is a fair and inexpensive way to deal with consumer complaints that could otherwise end in litigation. Take your license and claims against your license seriously. If you prepare fully and carefully for the hearing, you should be satisfied at its conclusion that the process has fulfilled its function and justice has been served.

Source: AS 08.88.450-495 12 AAC 64.280-32.



MISREPRESENTATION IN ALASKA LAW

When you are served with a Notice to Defend claim, it may be hard to believe. The customer for whom you found exactly the right home, in exactly the right neighborhood, for exactly the right price, and for whom you arranged the perfect financing package, has filed suit against you.

It seems that once breakup hit, groundwater began seeping into the basement. The buyer learned from his neighbors that the previous owner had always had a problem with water in the basement. In fact, he had sued the builder and won an award for the cost of repair.

He must have done the repairs, because you never saw any evidence of water damage. There was no mention on the property disclosure form of any seepage problem, or repair of water damage. You passed on the disclosure form to the prospective buyer as you showed him the property. Well, obviously you can't be hauled into court for the seller's fraudulent claims. Or can you?

WHAT IS MISREPRESENTATION

Misrepresentation is commonly defined as "a false or misleading statement." In law, it is defined as "a statement that the person making the statement knows or reasonably should know to be false, or the concealment of material fact, on which another relies to his detriment."

There are four elements necessary to legally establish misrepresentation:

1. a false statement or a concealment of material fact.
2. the person making the statement knows or should know that the statement is false.
3. the effect of the statement is to deceive or defraud the other person.
4. the other person relies on the false statement or concealment and is damaged.

Intentional misrepresentation occurs when the person making the statement knows it is false. Negligent misrepresentation occurs when the person making the representation should have known it was false. Real estate licensees may be held liable for intentional or negligent misrepresentation. They have a legal duty to discover and reveal material facts, because of the licensees' expert training and the public's reliance on the licensee. A fact is material if knowing the fact would alter the parties' decisions about the transaction.

The Alaska Supreme Court, in *AREC v. Johnston* 682 P2d 383 (Alaska 1984), held that, given the statutory history and purpose of the surety fund, only intentional misrepresentation was actionable. Therefore, negligence by a licensee, even gross negligence, is not sufficient to permit recovery. In preparing for a hearing, particularly if there is a question of fact as to the nature of your actions, you should be prepared to distinguish between fraud and intentional misrepresentation, and innocent or negligent misrepresentation. If these terms are confusing to you, consult an attorney to help you understand the difference.

NO LIABILITY FOR INNOCENT MISREPRESENTATION

Effective September 8, 1994, Alaska law no longer holds real estate licensees liable for innocent misrepresentations.

Alaska Statute 09.65.230. “INNOCENT MISREPRESENTATIONS BY AGENTS IN REAL PROPERTY TRANSFERS. The agent of a transferor or transferee is not liable for an innocent misrepresentation in information provided to the transferor or transferee in the transfer of an interest in real property if the agent does not have personal knowledge of the error, inaccuracy, or omission that is the basis for the misrepresentation.” The law applies to causes of action after the effective date. This means that if a real estate licensee misrepresents the facts in a transaction but has no knowledge or intention of doing so, he can no longer be held liable for the misrepresentation. This is a reversal of the standard set by the court in *Bevins V. Ballard*, 655 p.2d 775 (Alaska 1982), and many licensees believe it establishes a more fair distribution of responsibility.

MISREPRESENTATION AND SALES TALK

Sales talk is “puff” made in the context of inducing a party to buy or sell. “This house is the best buy on the market,” is a statement often made which may be untrue. Most buyers recognize sales talk and do not rely on such statements. Because there is no reliance, there is no misrepresentation.

However, the line between puff and misrepresentation is narrow. Licensees must use extreme care in choosing the words used to encourage a sale.

MISREPRESENTATION AND OPINION

Opinion is an expression of what one believes to be true. An opinion may be positive or negative, and is not intended to be interpreted as fact. Alaska law does not protect a licensee from a finding of misrepresentation simply by phrasing a representation as an opinion

PROTECTION FROM LIABILITY

There is no way to avoid the possibility of being sued for misrepresentation. The Alaska Supreme Court has made it abundantly clear that the level of responsibility to which Alaska licensees will be held in real estate transactions is high. However, the court has provided these suggestions for your protection. Following them carefully is a good place to begin.

AVOID MISREPRESENTATION

- *NEVER say anything you know is untrue, even if you consider it simply as sales talk.
- *If you don’t know the answer to a question, say that you don’t know, and find out if you can reasonably do so.
- *Have the seller provide his representations about the property in writing, and give a copy to the buyer.
- *Provide to both parties in the transaction any and all material facts at your disposal.
- *Keep good records of all contacts with clients and customers in the course of every transaction.

Following these rules will help you create a pattern of doing business that will provide you the best possible protection.

COMPLAINT AND HEARING PROCESS

COMPLAINT PROCESS

When the Commission receives a complaint, it is carefully investigated. Every effort is made to be fair and honest with the licensee who is accused of wrongdoing, and with the party bringing the complaint. The aim is to resolve the complaint as quickly and painlessly as possible for both parties, while never losing sight of the Commission's responsibility to protect the public.

Once the investigation is complete, the licensee is notified of the findings. If, in fact, a violation has been established, the case goes to the Attorney General's Office for review and prosecution. The complainant becomes a witness in a case brought by the State of Alaska against the licensee.



HEARING PROCESS

Once the investigative staff is satisfied that a violation of the license law can be proven, a formal charge (an accusation) is filed with the Attorney General's Office. The accusation identifies the sections of the law the licensee is alleged to have violated, and asks that disciplinary action be taken against the licensee. The Attorney General then reviews the accusation. If the Attorney General agrees that there is a violation of the law and enough evidence to prove the charges, the accusation is formally served on the licensee. The licensee then has 15 days to give notice that he/she intends to defend him/herself at an administrative hearing. (*AS 44.62.330 – 44.62.630*).

THE HEARING

An Administrative Law Judge (ALJ), who is employed by the Office of Administrative Hearings, schedules the hearing. The ALJ presides at the hearing to ensure that the accused is afforded due process in accordance with the Alaska Administrative Procedures Act. The State's case is presented by the Attorney General, and the complainant and the investigator are witnesses for the State. The accused licensee may present evidence to refute the accusation, and may be represented by an attorney.

THE DECISION

The ALJ prepares a proposed decision, based on the evidence and arguments presented at the hearing. The proposed decision consists of findings of fact and conclusions of law and recommends, what, if any, discipline should be imposed. The proposed decision then goes before the Commission at its regularly scheduled meeting. If any Commission member has had contact with any of the parties regarding the case, he/she may not participate in the deliberations. The Commission considers the decision, and may examine the file and question the ALJ. The Commission may adopt or reject the proposed decision, remand the case to the ALJ, call for the record and write a new decision, or hold a new hearing.

THE DISCIPLINARY ACTION

The Commission has a choice of several disciplinary sanctions to impose. They range from issuing a letter of reprimand to revoking the individual's license, with many intermediary steps, including fines of up to \$5,000 per violation, probation, a downgrade of license eligibility, imposition of remedial requirements or suspension of the license. Once the Commission has made a decision, all parties are notified. Either side may then request that the Commission reconsider its decision or that the case be reviewed by the Superior Court.

RECONSIDERATION AND APPEAL

From a practical standpoint, it is always best to “win your case” at the earliest opportunity. A license complaint or a surety fund claim is a serious matter, and you should prepare your best case possible for the administrative hearing. You have the right to be represented by an attorney if you choose. If the Commission does not initially rule in your favor, you have a right to request reconsideration, and to take the case to court on appeal.

The hearing process is governed by the administrative adjudication procedures (*AS 44.62.330—44.62.630*) in the Administrative Procedures Act [*See AS 44.62.330(a)(14)*]. After a hearing, the ALJ who presided at the hearing will prepare a written proposed decision, including the ALJ’s decision on the facts and the law in the case.

The Commission may adopt the decision or not. If it does not adopt the decision, the Commission may decide the case upon the record or order a remand to the ALJ to take additional evidence (*AS 44.62.500*). The Commission’s decision must be written and must contain findings of fact, conclusions of law and the disciplinary action, and/or amount of the award to the claimant, if any (*AS 44.62.500, AS 44.62.510, and AS 08.88.470*).

If the Commission does not order discipline or payment of an award, generally you will be satisfied, but the State or the claimant may ask the Commission for reconsideration or may appeal the decision. If the Commission orders discipline or an award, you may ask the Commission for reconsideration, or you may appeal. Prevailing is important, not only to avoid your liability to repay the Surety Fund, but also to avoid the taint of any finding of “fraud, misrepresentation, deceit, or conversion of funds” [*AS 08.88A90 and AS 08.888.465(b)*], and/or the loss or limitation of your professional license. Since the appeal and reconsideration stages generally involve legal or technical issues, you will not necessarily need an attorney’s services to prosecute or defend the appeal.

RECONSIDERATION

Reconsideration of complaint or surety fund decisions is governed by the Administrative Procedures Act (*12 AAC 64.320 and AS 44.62.540*). The Commission may order reconsideration (on all or part of the matter) on its own, or on petition of a party. The Commission must order reconsideration, if it is going to do so, within 30 days after the delivery or mailing of the decision to the parties.

Therefore, if you wish to ask the Commission to reconsider a decision, you should petition the Commission in writing as soon as possible, so that the determination of whether to grant or deny the reconsideration may be made within the 30 days.

PETITION FOR RECONSIDERATION

You should include in your petition for reconsideration all the factual or legal errors you believe the Commission made in reaching its decision. You should provide concise, well written arguments on each point that you believe was in error.

The Commission may choose to reconsider for one or more of the following reasons:

- 1) Newly discovered evidence that was not available at the time of the hearing
- 2) Procedural irregularities
- 3) Good cause for the licensee’s failure to appear or supply evidence, and
- 4) A decision not substantiated by the evidence

If the Commission orders reconsideration, it may do one of several things. It may reconsider on the record of the hearing or may request additional evidence and/or argument. In addition, it may also assign the matter to a ALJ for a further evidentiary hearing. If you file a Petition for Reconsideration but the Commission does not agree to reconsider its decision, your only avenue of redress is a formal appeal to the Superior Court.

APPEAL

If the Commission either refuses to reconsider its decision, or reconsiders but does not change its decision, you or the other party may choose to appeal. An appeal from an administrative agency is made to the Superior Court. The appeal procedures are governed by the appellate rules, Rules 601-611. Again, consult your attorney regarding an appeal.

The appeal must be filed within 30 days of the date you are served with the order. If you had already requested reconsideration by the agency, you have an additional 30 days [*Appellate Rule 602(a)(2)*]. It is important, however, that you see your attorney, as soon as you decide to appeal.

PARTIES ON APPEAL

In the case of a surety claim, the Commission will generally take the position that the parties on appeal should be the claimant and the licensee(s) involved. Sometimes the appellant will name the Real Estate Commission as the only other party in the appeal.

For instance, a surety fund claimant who was denied an award might caption the appeal “*Jones v. the State of Alaska Real Estate Commission.*” In this situation, the Attorney General’s Office would move to pin the licensee as an indispensable party. Except in unusual circumstances, the Commission would not then participate in the appeal, but would allow the appeal to be conducted by the claimant and the licensee.

STAYS

You, the licensee, would seldom have to apply for a stay of the Commission order, since the Real Estate Commission staff does not present a surety fund award check to the claimant until 60 days after the mailing of the decision. This insures that a claimant is not paid prior to an appeal. If an appeal or reconsideration is pending, staff does not release a check to the claimant until that appeal or reconsideration is concluded.

BOND

In order to file an appeal with the Superior Court, the appellant will be required to post a bond in an amount as fixed by the Superior Court or, in the alternative, make application for leave to file the appeal without bond. [*Appellate Rule 602(c)*].

SUBJECT ON APPEAL

In most cases, appeals to Superior Court from an administrative agency are based on legal issues. The Superior Court, therefore, generally examines questions such as: “Was it a fair hearing?” “Was there an abuse of the Commission’s discretion?” “Was the decision supported by the findings?” In these situations, you will not be permitted to supplement the record; that is, additional testimony or documents will not be allowed into evidence. The Superior Court (the judge without a jury) will make its determination based on the record of the hearing, the written briefs from the parties to the appeal, and oral argument (if requested by either party).

Rarely does the Superior Court augment the record or hold a hearing de novo (a new hearing), but the court does have discretion to do this (*AS 44.62.570(d)*), and in certain cases, might. More often, if the court believes that additional evidence needs to be taken, the court will remand the matter to the Commission to reconsider the case or take additional evidence. The Superior Court normally will give deference to the expertise of the Commission rather than exercising the court's independent judgment, so long as the findings of the Commission are substantiated by evidence.

Thus, the final result of a Superior Court appeal is that the Superior Court will either remand the matter to the Commission to take further evidence, or issue a decision upholding or overruling the Commission's decision. Assuming there is no remand to the Commission, the losing party in Superior Court may then appeal the decision to the Alaska Supreme Court.

THE FOUR GOLDEN RULES

KNOW THE LAW

As a broker, you need to know the legal principles affecting you and your business. You can learn to use the law to your benefit without having to memorize it. As you work in the business, you will continue to add understanding of the parts in the law most directly affecting your daily practice.

ATTEND PROFESSIONAL TRAINING

Whenever professional legal education is available, you should make it a point to participate. The law is constantly changing.

LEARN CASE LAW

What you must do is understand the general principles of real estate law, so that you know when you need legal advice.

KEEP EXCELLENT RECORDS

Accurate record keeping, a good relationship with an attorney, and a personal knowledge of the law are important parts of the armor you need to make it in your profession.

EARNEST MONEY DISPUTES

Earnest money disputes can be a problem for the broker. When the parties disagree about who is entitled to trust funds, the broker is caught in the middle.

If the parties cannot agree, you must make a timely determination about what to do with the money. Many brokers attempt to get the parties to sign a rescission agreement before disbursing any funds. Though this would be preferable from your point of view, there is no provision in the license law to permit you to keep trust money until both parties sign a rescission agreement.

According to the terms of your contract with the trustor, you may recommend that the parties mediate, that they submit to arbitration, or you may interplead.

V. CHECKLIST FOR STARTING YOUR REAL ESTATE BUSINESS

1. Prepare a written business plan, complete with financial information.
2. Decide whether to operate as a sole proprietor, a partnership, a corporation or a limited liability company.
3. If you decide to incorporate, obtain the necessary incorporation papers from the Division of Corporations, Business and Professional Licensing.
4. Obtain your broker license and register your office with the Real Estate Commission, Division of Corporations, Business and Professional Licensing.
5. Obtain an Alaska business license from the Division of Corporations, Business and Professional Licensing.
6. Obtain a federal employer identification number from the Internal Revenue Service (IRS).
7. Contact the IRS Taxpayer Education Service to determine potential tax obligations and filing requirements.
8. Obtain an unemployment insurance identification number from the Unemployment Security Division, Alaska Department of Labor.
9. Determine what you must do to comply with the Workers' Compensation Act by contacting the Workers' Compensation Division, Alaska Department of Labor.
10. Determine what you must do to comply with the Occupational Safety and Health Act by contacting the Standards and Safety Division, Alaska Department of Labor.

VI. BUSINESS PLAN CHECKLIST

To convince a lender that you are a good credit risk, you must be prepared before you request financing. Your business plan should be detailed and complete. Here is a general outline of information your lender will probably want to see.

Cover Sheet

- Business name and address
- Names, addresses and social security numbers of all principals
- Statement of Purpose
- Purpose of the loan (state the exact purpose of the loan and why you need it)
- Amount of funding required (know the exact amount you need to accomplish your goals)
- Table of Contents

The Business Ownership and Legal Structure of the Business

- Management description (list skills, education and experience of all principals)
- Type of business
- Precise description of the business
- Advantages of your service over those of your competitors (your niche)
- Marketing Information
- Demand for your service
- Customer demographics
- Advertising strategy
- Pricing strategy and break-even point
- Financial information
- Projected balance sheet and income statement (Example-Appendix)
- Personal balance sheet, proposed method of compensation for principals
- Collateral available for securing the loan

Supporting Documents

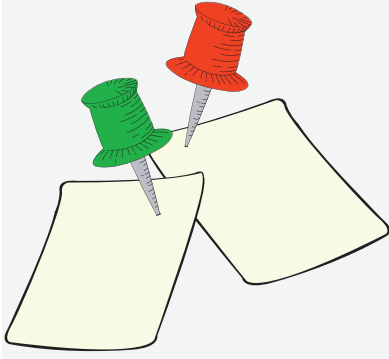
- Personal resumes
- Cost of living budget
- Credit reports
- Letters of reference
- Job descriptions
- Letters of intent
- Copies of leases
- Copies of contracts and legal documents

VII. POLICY AND PROCEDURE MANUAL CHECKLIST

This checklist is intended as a starting point. There are undoubtedly other topics you will want to cover, and some of these you may eliminate. Your completed policy and procedures manual should reflect everything that is important to you, and everything your associates need to know to get along harmoniously in your office.

- Steps for processing a listing
- Verifying the accuracy of property information
- Dealing with disclosure statements
- Mortgage information
- Title information
- CMA's and/or Appraisals
- Security of properties
- Personal security
- Disseminating information to other licensees
- Signs and lock boxes, special showing instructions
- Multiple Listing Service rules and procedures
- Office caravans
- Marketing plans and how to handle responses
- Ads
- Flyers, brochures
- Open houses
- Special investor presentations
- Handling offers to purchase
- Presenting and negotiating an offer
- Handling multiple offers
- Earnest money deposit procedures
- Managing settlement procedures
- Transaction folder checklist: who does what, when?
- Resolving or removing obstacles
- Periodic review of progress
- Review of settlement statement and closing documents
- Commission letter
- Follow-up and thank-you after closing
- Incentive programs
- Floor time
- Use of AREC Forms; Consumer Pamphlet and Waiver of Right to be Represented
- Compliance with Broker Policy as required in AS 08.88.685
- Security of client's information

IX. FREQUENTLY ASKED QUESTIONS



WHAT IS ARBITRATION?

If the parties agree to arbitrate, they present the dispute to a third party whose decision will be binding on the parties.

WHAT IS INTERPLEADING?

When you interplead, you are submitting the problem to the court for a determination. When it is clear that the parties cannot agree, it may be wise to consult your attorney before disbursing funds.

WHAT IS MEDIATION?

Mediation is a form of dispute resolution in which the parties discuss the disagreement with a third party who advises them regarding resolution of the problem. The parties are not required to accept the suggestions of the mediator, but sometimes they can come up with a mutually acceptable solution.

WHAT IS MISREPRESENTATION?

Misrepresentation is commonly defined as “a false or misleading statement.” In law, it is defined as “a statement that the person making the statement knows or reasonably should know to be false, or the concealment of material fact, on which another relies to his detriment.”

WHO PAYS FOR SURETY FUND HEARINGS?

At the time a claim is filed, the claimant pays a filing fee of \$250. It is refundable if the claimant prevails, but if he/she fails to prove the case, it is used to help pay for the hearing. A licensee found responsible for payment of a claim may be charged the costs of the hearing per 08.88.071(b).

WHO WILL BE NAMED IN THE SURETY FUND CLAIM?

As a broker, you are responsible for the actions of the licensees in your office. If one of them is named in a surety claim, you are also named.

WILL A PAID CLAIM COST YOU YOUR LICENSE?

Even if a claim against you is paid, you will not automatically lose your license. You are required to reimburse the fund for the amount of the claim and hearing costs, but if you make satisfactory arrangements for repayment and abide by your repayment agreement, you may retain your license and work. This does not apply, of course, if a corresponding license action revokes, suspends, or places limits on your license. In short, the surety fund provides a consumer protection tool and an inexpensive, limited bond for real estate licensees. It also provides funds for the Commission’s educational efforts, such as the Commission newsletter and this publication.

IS THIS A REAL ESTATE TRANSACTION?

The fund may reimburse individuals only for actual losses caused by fraud, deceit, intentional misrepresentation or the conversion of trust funds on the part of a real estate licensee in a real estate transaction.

Through interpretation, the Commission has defined the limits of a “real estate transaction.” Excluded, for example, are situations in which the underlying transaction is primarily a business transaction.

This includes loans involving real property as collateral. Since a real estate license is not required for solicitation of money in a business transaction, the fund cannot reimburse losses in such a transaction.