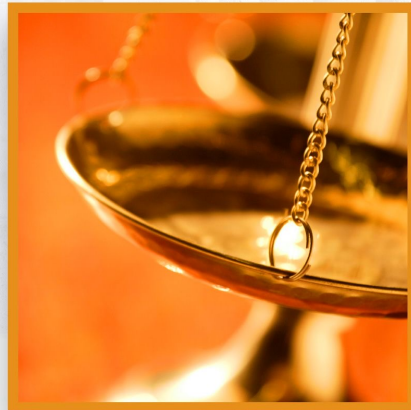


# 2023 Legal Update



# FEBRUARY



New York State Association of REALTORS®, Inc.

Legal Hotline

**Monday-Friday**

**9:00a.m.-4:00p.m.**

**518-436-9727**

# Welcome!!!

- NYSAR's free monthly Legal Update CE
- May take once every license renewal period for 1 credit under legal update category
- Recorded and livestreamed for non-credit

## 2023 Dates

March 21

April 18

May 16

June 12

July 18

August 22

September 12

October 17

November 14

December 19

## How to Register

- NYSAR.com
- Education
- Legal Update CE Course
- Register for a legal update

# ARE TELEMARKETING COLD CALLS STILL PROHIBITED?

Are cold calls still prohibited?

**YES**

# When Will the State of Emergency Expire?

- NO COLD CALLS
- The law is not industry specific and is triggered statutorily by **any** SoE
- Currently multiple SoE's in effect
- Only when all SoE is lifted will cold calling be permitted



# General Business Law §399-z(1)

- h. “Telemarketer” means any person who, for financial profit or commercial purposes in connection with telemarketing, makes telemarketing sales calls or electronic messaging texts to a customer when the customer is in this state or any person who directly controls or supervises the conduct of a telemarketer. For the purposes of this section, “commercial purposes” shall mean the **sale or offer for sale of goods or services**;
- j. “Telemarketing sales call” means a **telephone call or electronic messaging text made directly or indirectly by a telemarketer** or by any outbound telephone calling technology that delivers a prerecorded message to a customer or to a customer’s voicemail or answering machine service, in which such telephone call or electronic messaging text is for the purpose of inducing payment or the exchange of any other consideration for any goods or services

## General Business Law §399-z(5-a)

“It shall be unlawful for any telemarketer doing business in this state to knowingly make an unsolicited telemarketing sales call to any person in a county, city, town or village under a declared state of emergency or disaster emergency as described in sections twenty-four or twenty-eight of the executive law.”

# NEW TELEMARKETING LAW AND GENERAL OVERVIEW

## General Business Law §399-z(2)

No telemarketer or seller shall engage in telemarketing at any time other than between 8:00 A.M. and 9:00 P.M. at the location of the customer unless the customer has given his or her express consent to the call at a different time.

# General Business Law §399-z(2) NEW

Effective March 6, 2023:

Telemarketers shall provide, in a clear and coherent manner using words with common and everyday meanings, at the beginning of each telemarketing sales call all of the following information, provided that the information set forth in paragraphs a and b of this subdivision shall be given to the customer first:

## General Business Law §399-z(2) NEW

- a. the telemarketer's name and the person on whose behalf the solicitation is being made, if other than the telemarketer;
- b. the option to be automatically added to the seller's entity specific do-not-call list, as required by subdivisions seven, eight, and nine of this section;
- c. whether the call is being recorded;
- d. the purpose of the telephone call; and
- e. the identity of the goods or services for which a fee will be charged.

# General Business Law §399-z(6)

No telemarketer or seller shall initiate any telemarketing sales call by means of a technology that delivers a pre-recorded message, unless the telemarketer or seller has obtained from the customer an express agreement, in writing that:

- a. the telemarketer or seller obtained only after a clear and conspicuous disclosure that the purpose of the agreement is to authorize the seller to make telemarketing sales calls to such customer;
- b. the telemarketer or seller obtained without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service;
- c. evidences the willingness of the customer to receive telemarketing sales calls by or made on behalf of a specific seller; and,
- d. includes such customer's telephone number and signature.

## General Business Law §399-z(7)

In the case of any telemarketing sales call delivered by means of a technology that delivers a pre-recorded message that could be received by a customer who can use an automated interactive voice and/or keypress activated opt-out mechanism to assert a do-not-call request, such call shall include a mechanism that allows the customer to automatically add the number called to the seller's entity specific do-not-call list, and which mechanism, once invoked, immediately ends the call.



## General Business Law §399-z(8)

In the case of any telemarketing sales call delivered by means of a technology that delivers a pre-recorded message that could be answered by an answering machine or voicemail service, that the call include a toll-free number that must connect the customer directly to an automated interactive voice or keypress activated opt-out mechanism that allows the consumer to automatically add the number called to the seller's entity specific do-not-call list, and which mechanism, once invoked, immediately ends the call.

## General Business Law §399-z(9)

In the case of any telemarketing sales call made by a natural person, the telemarketer or seller shall inform the customer that he or she may request that his or her telephone number be added to the seller's entity specific do-not-call list. If the customer opts to do so, the telemarketer or seller shall immediately end the call and shall add the number called to such list or cause the number called to be added to such list.

## General Business Law §399-z(10)

No telemarketer or seller shall transmit, share, or otherwise make available any customer's contact information, including name, telephone number, or email address, which has been provided to such telemarketer or seller by such customer, to any person, corporation, or other entity without the express agreement of the consumer in writing or in electronic format, unless otherwise required by law, or pursuant to a lawful subpoena or court order.

General Business Law §399-z(2)

Telemarketers and sellers shall keep for a period of twenty-four months from the date the record is created records relating to its telemarketing activities.

## General Business Law §399-z(2-a)

It shall be unlawful for any telemarketer or seller to knowingly cause any caller identification service to transmit misleading, inaccurate, or false caller identification information, provided that it shall not be a violation to substitute (for the name and phone number used in, or billed for, making the call) the name or telephone number of the person or seller on behalf of which a telemarketing call is placed.

# NEW PROTECTED CLASSES UNDER NYS HUMAN RIGHTS LAW

## Executive Law §296(5)

*(a) It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right to sell, rent or lease a housing accommodation, constructed or to be constructed, or any agent or employee thereof:*

*(1) To refuse to sell, rent, lease or otherwise to deny to or withhold from any person or group of persons such a housing accommodation because of the race, creed, color, national origin, **citizenship or immigration status**, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, status as a victim of domestic violence, lawful source of income or familial status of such person or persons, or to represent that any housing accommodation or land is not available for inspection, sale, rental or lease when in fact it is so available.*

## Executive Law §296(5)

*(a) It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right to sell, rent or lease a housing accommodation, constructed or to be constructed, or any agent or employee thereof:*

*(2) To discriminate against any person because of race, creed, color, national origin, **citizenship or immigration status**, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, status as a victim of domestic violence, lawful source of income or familial status in the terms, conditions or privileges of the sale, rental or lease of any such housing accommodation or in the furnishing of facilities or services in connection therewith.*



## Executive Law §296(5)

*(a) It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right to sell, rent or lease a housing accommodation, constructed or to be constructed, or any agent or employee thereof:*

*(3) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of such housing accommodation or to make any record or inquiry in connection with the prospective purchase, rental or lease of such a housing accommodation which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, **citizenship or immigration status**, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, **status as a victim of domestic violence**, lawful source of income or familial status, or any intent to make any such limitation, specification or discrimination.*

## Executive Law §300

*The provisions of this article **shall be construed liberally** for the accomplishment of the remedial purposes thereof, regardless of whether federal civil rights laws, including those laws with provisions worded comparably to the provisions of this article, have been so construed. Exceptions to and exemptions from the provisions of this article shall be construed narrowly in order to maximize deterrence of discriminatory conduct.*

## Definition Executive Law §292

*41. The term “citizenship or immigration status” means the citizenship of any person or the immigration status of any person who is not a citizen of the United States. Nothing in this article shall preclude verification of citizenship or immigration status where required by law, nor shall an adverse action based on verification of citizenship or immigration status be prohibited where such adverse action is required by law.*

# Citizenship/Immigration Status

- *DHR has always been of the opinion that immigration status/citizenship was protected under “national origin”*
- *Other protections may be applicable (race, creed, color)*
- *Law also changed terms:*
  - *“Alien” is now “noncitizen”*
  - *“Illegal alien” is now “undocumented noncitizen”*

## A 6328-A / S 6586-A Memo

*The State of New York and its citizens have long held the belief that there is no room for discrimination of any kind in our state and communities. The Division of Human Rights currently investigates cases in which individuals have been discriminated against because of their national origin. This proposal would expand these protections, and make clear to employers, housing providers, places of public accommodation, and others that discrimination because of citizenship and immigration status is also unlawful in New York State. The legislation will enable the Division to extend protections and to have clarity with regard to their mission.*

# NYS Protected Classes

Race

Color

Sexual orientation

Military status

Age

Marital status

Familial status

Immigration status

Creed

National origin

Gender identity or expression

Sex

Disability

Lawful source of income

Status as a victim of domestic violence

Citizenship

# Federally Protected Classes

Race

Color

National Origin

Religion

Familial Status

Disability

Sex (including gender identity and sexual orientation)

# Federal Disparate Impact

Federal law also protects limited English proficiency and criminal background under the disparate impact theory.



# Federal Disparate Impact

A housing provider violates the Fair Housing Act when the provider's policy or practice has an unjustified discriminatory effect, even when the provider had no intent to discriminate.

# Federal Disparate Impact

Under this standard, a facially-neutral policy or practice that has a discriminatory effect violates the Act if it is not supported by a legally sufficient justification.

# Federal Disparate Impact

Thus, where a policy or practice that restricts access to housing on the basis of limited English proficiency or criminal history has a disparate impact on individuals of a particular race, national origin, or other protected class, such policy or practice is unlawful under the Fair Housing Act if it is not necessary to serve a substantial, legitimate, nondiscriminatory interest of the housing provider, **or if such interest could be served by another practice that has a less discriminatory effect.**

# FLOOD DISCLOSURE IN RESIDENTIAL LEASES

# Real Property Law §231-b Memo

This bill would establish a flood risk "right to know" for renters. The Natural Resources Defense Council (NRDC) currently gives New York's flood risk disclosure law a failing grade in part because New York's flood disclosure laws only apply to sales of residential real property, meaning that renters are not receiving adequate disclosures about the flood risks and history of the units they lease.

# Real Property Law §231-b Memo

Recent storms, like Hurricanes Ida and Henri, caused damage to thousands of apartments and extensive damage to the personal property of rental households. Robust flood disclosure is a necessary tool for protecting New Yorkers on the frontline of climate change. Vulnerable communities have repeatedly expressed concerns regarding the growing costs of flood damage in their homes, but renters from low-income communities experiencing repeated flood events are often never warned about the risks they face when moving into a new home. Flood disclosure meets the fundamental goal of providing awareness and transparency for all residents, irrespective of income. Studies have shown that knowing the level of one's risk helps change patterns of behavior related to flood insurance, increasing uptake of up to 15 percent or more.

# Real Property Law §231-b

**Effective June 21, 2023**

# Real Property Law §231-b

1. Every residential lease shall provide notice of the following information related to the previous flood history and current flood risk of the leased premises, as follows:

(a) whether any or all of the leased premises is located wholly or partially in a Federal Emergency Management Agency (“FEMA”) designated floodplain;



# Real Property Law §231-b

1. Every residential lease shall provide notice of the following information related to the previous flood history and current flood risk of the leased premises, as follows:

(b) whether any or all of the leased premises is located wholly or partially in the Special Flood Hazard Area (“SFHA”; “100-year floodplain”) according to FEMA’s current Flood Insurance Rate Maps for the leased premises’ area;

# Real Property Law §231-b

1. Every residential lease shall provide notice of the following information related to the previous flood history and current flood risk of the leased premises, as follows:

(c) whether any or all of the leased premises is located wholly or partially in a Moderate Risk Flood Hazard Area (“500-year floodplain”) according to FEMA’s current Flood Insurance Rate Maps for the leased premises’ area; and

# Real Property Law §231-b

1. Every residential lease shall provide notice of the following information related to the previous flood history and current flood risk of the leased premises, as follows:

(d) whether the leased premises has experienced any flood damage due to a natural flood event, such as heavy rainfall, coastal storm surge, tidal inundation, or river overflow.

# Real Property Law §231-b

2. Every residential lease shall also contain the following notice to tenants: “Flood insurance is available to renters through the Federal Emergency Management Agency’s (FEMA’s) National Flood Insurance Program (NFIP) to cover your personal property and contents in the event of a flood. A standard renter’s insurance policy does not typically cover flood damage. You are encouraged to examine your policy to determine whether you are covered.”

# CHANGES TO PCDS: MOLD DISCLOSURE

# Real Property Law §462(2) Memo

Indoor mold has been referred to as "killer mold", this is because the health risks associated with certain types of mold are tremendous. Inhalation of a wide variety of fungi can lead to or exacerbate existing allergies. Mold has also been found to cause toxic effects or infections. Currently, there are no government standards or practices for detection, prevention, and/or remediation of indoor mold. The public needs to be aware that indoor mold is a threat and what to do to clean up indoor mold if found on their property. The Department of Health can serve this need by creating guidelines for the public to identify, deal with, and prevent indoor mold.

# Real Property Law §462(2) Memo

The history of mold must be disclosed in order to prevent further mold growth. Health risks are increased in property where indoor mold is hidden or not identified as dangerous. This is exactly why new property buyers need to be informed of past indoor mold growth, as they are with past records of lead paint and other hazardous materials contained in the property. In the case of public housing, it is equally important the property is free of indoor mold, and that procedures exist to deal with the detection, clean up and prevention of mold.

Real Property Law §462(2)

**Effective June 14, 2023**



# Real Property Law §462(2)

## ENVIRONMENTAL

NOTE TO SELLER - IN THIS SECTION, YOU WILL BE ASKED QUESTIONS REGARDING PETROLEUM PRODUCTS AND HAZARDOUS OR TOXIC SUBSTANCES THAT YOU KNOW TO HAVE BEEN SPILLED, LEAKED OR OTHERWISE BEEN RELEASED ON THE PROPERTY OR FROM THE PROPERTY ONTO ANY OTHER PROPERTY. PETROLEUM PRODUCTS MAY INCLUDE, BUT ARE NOT LIMITED TO, GASOLINE, DIESEL FUEL, HOME HEATING FUEL, AND LUBRICANTS. HAZARDOUS OR TOXIC SUBSTANCES ARE PRODUCTS OR OTHER MATERIAL THAT COULD POSE SHORTOR LONG-TERM DANGER TO PERSONAL HEALTH OR THE ENVIRONMENT IF THEY ARE NOT PROPERLY DISPOSED OF, APPLIED OR STORED. THESE INCLUDE, BUT ARE NOT LIMITED TO, FERTILIZERS, PESTICIDES AND INSECTICIDES, PAINT INCLUDING PAINT THINNER, VARNISH REMOVER AND WOOD PRESERVATIVES, TREATED WOOD, CONSTRUCTION MATERIALS SUCH AS ASPHALT AND ROOFING MATERIALS, ANTIFREEZE AND OTHER AUTOMOTIVE PRODUCTS, BATTERIES, CLEANING SOLVENTS INCLUDING SEPTIC TANK CLEANERS, HOUSEHOLD CLEANERS, POOL CHEMICALS , PRODUCTS CONTAINING MERCURY AND LEAD AND INDOOR MOLD.

19-a. HAS THE PROPERTY BEEN TESTED FOR INDOOR MOLD? YES NO UNKN (IF YES, ATTACH A COPY OF THE REPORT)

# Real Property Law §462(2)

19-a. HAS THE PROPERTY BEEN TESTED FOR INDOOR MOLD? YES NO UNKN (IF YES, ATTACH A COPY OF THE REPORT)

# Real Property Law §462(2)

- New PCDS forms will be available from the DOS.
- Local boards/associations, MLS' and brokers must use the new form beginning June 14, 2023.

# NYS SALARY TRANSPARENCY

Labor Law 194-b

**Effective September 17, 2023**

# Labor Law 194-b

1. a. No employer, employment agency, employee, or agent thereof shall advertise a job, promotion, or transfer opportunity that can or will be performed, at least in part, in the state of New York, without disclosing the following:
  - (i) the compensation or a range of compensation for such job, promotion, or transfer opportunity; and
  - (ii) the job description for such job, promotion, or transfer opportunity, if such description exists.
- b. Advertisements for jobs, promotions, or transfer opportunities paid solely on commission shall maintain compliance with subparagraph (i) of paragraph a of this subdivision by disclosing in writing in a general statement that compensation shall be based on commission.

# Labor Law 194-b

2. No employer shall refuse to interview, hire, promote, employ or otherwise retaliate against an applicant or current employee for exercising any rights under this section.
3. The commissioner shall promulgate rules and regulations to effectuate the provisions of this section.
4. The department shall conduct a public awareness outreach campaign, which shall include making information available on its website and otherwise informing employers of the provisions of this section.

# Labor Law 194-b

5.
  - a. Any person claiming to be aggrieved by a violation of this section may file with the commissioner a complaint regarding such alleged violation for an investigation of such complaint and statement setting the appropriate remedy, if any, pursuant to the provisions of section one hundred ninety-six-a of this article.
  - b. An employer who fails to comply with any requirement of this section or any regulation published thereunder shall be deemed in violation of this section and shall be subject to a civil penalty in accordance with section two hundred eighteen of this chapter.
6. An employer shall keep and maintain necessary records to comply with the requirements of this section including, but not limited to, the history of compensation ranges for each job, promotion, or transfer opportunity and the job descriptions for such positions, if such descriptions exist.



# Labor Law 194-b

7. For the purposes of this section the following terms shall have the following meanings:

a. “range of compensation” shall mean the minimum and maximum annual salary or hourly range of compensation for a job, promotion, or transfer opportunity that the employer in good faith believes to be accurate at the time of the posting of an advertisement for such opportunity.

b. “employer” shall mean:

(i) any person, corporation, limited liability company, association, labor organization or entity employing four or more employees in any occupation, industry, trade, business or service, or any agent thereof; and

(ii) any person, corporation, limited liability company, association or entity acting as an employment agent or recruiter, or otherwise connecting applicants with employers, provided that “employer” shall not include a temporary help firm as such term is defined by subdivision five of section nine hundred sixteen of this chapter.

8. The provisions of this section shall not be construed or interpreted to supersede or preempt any provisions of local law, rules, or regulations.

## Labor Law 194-b

The Dept. of Labor will adopt rules and regulations and conduct a public awareness outreach campaign, which shall include making information available on its website and otherwise informing employers of the provisions of this section.

# Labor Law 194-b

## Who is covered:

- Office Manager
- Office Staff
- Personal Assistants
- Non IC agents

# Labor Law 194-b

What about agents:

Although the law only applies to “employers”, NYSAR will review guidance once it is released by the Dept. of Labor

# COURT/DOS DECISIONS

# DOS v G

- G-Licensed salesperson
- A-Broker
- N-Cooperating broker
- Z-Consumer

# DOS v G

- Z was looking for property to purchase
- N represented Z
- G was listing agent for property

# DOS v G

- Z placed offer on property
- Offer had escalation clause
- Z advised by agent that offer accepted
- Due to other offer, escalation was maxed (\$11k increase)
- Z asked for copy of other offer



# DOS v G

- G was away and could not provide other offer for 1 week
- Other offer forwarded and dated the day before Z made their offer

# DOS v G

- Z determined that other offer:
  - Altered copy of an offer
  - Other offer was fraudulent
  - Other offer previously accepted and withdrawn for prior listing
- Z then withdrew offer
- Z refused to work with G
- Z submitted new offer to new listing broker

# DOS v G

- Delay if offer cost Z to lose rate and paid a higher APR now
- Cost of higher APR is over \$12k
- No party had any communications with A who was Z's broker
- Complaint filed with DOS

# DOS v G

- G stated to DOS that:
  - it was proper to use a previous offer to invoke the escalation clause.
  - Admits to changing the dates to bring it current and 'make it work'
  - Does not mention alteration of amount of previous offer to make it higher

# DOS v G

- G's broker, A filed a complaint with DOS against G
- A's complaint alleges G took commissions of \$79k directly
- G stated to DOS:
  - I've never accepted a commission check in my name.
  - I do have several real-estate related businesses under an umbrella corporation that performs several industry-related jobs and often gets paid out of the closing proceeds, things like staging, renovation, the like...

# DOS v G

- During investigation, DOS discovered:
  - Numerous invoices made payable to G instead of broker
  - Numerous invoices made payable to broker A that were instead cut to G
  - G waived commission in exchange for work done by consumer without broker A knowing
  - G denied collecting commissions directly

# DOS v G

- During investigation, DOS discovered:
  - G advertised under illegal Team name
  - G advertised self as “premier real estate agent brokerage”
  - No reference to license status or actual brokerage
  - G admitted to holding commissions from broker as broker did not pay G all commissions due prior
  - A claims all commissions were paid to G

# DOS v G

- Originally, A started brokerage and made G manager
- G claims on occasion commission checks were mistakenly made out to G and A told them it was OK to have commission checks to G directly so long as broker was paid their cut
- Office admin states they called attorneys looking for commissions and was told they were recut to G directly
- Office admin stated all commissions owed were paid to G



# DOS v G

- Findings:
  - Collecting commission from someone other than broker
  - Collecting commission with intent to keep full amount
  - Holding themselves out as a broker
  - Improper team name

# DOS v G

- Discipline:
  - G salespersons license revoked
  - G instructor license revoked
  - If ever to reapply must show proof that broker A was paid all outstanding commissions collected by G