



2023 Legal Update

SEPTEMBER



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

Remaining 2023 Dates

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

Get the word out!!!!

- Please let other licensees know
- Keep your peers up to date on new laws
- Increase knowledge and professionalism
- 2024 dates being scheduled now
- Thank you for making this a success!!

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.”

How will I know when the SoE's expire?

- NYSAR news via email
- [nysar.com](https://www.nysar.com) homepage



How will I know when the SoE's expire?

- **EO 28.3: Support Asylum Seekers**

Declared: Extended on July 26, 2023 (Original EO 28 declared May 9, 2023)

Expires: August 25, 2023

- **EO 3.23: Disaster Emergency related to Gun Violence**

Declared: Extended on August 13, 2023 (Original EO 211 declared July 6, 2021)

Expires: September 12, 2023

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

Effective June 21, 2023

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

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)

Effective June 14, 2023

Real Property Law §462(2)

- The amended PCDS only adds some language and a new question
- The seller still has the ability to “opt out” and pay the \$500 under the advice of their attorney

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)

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.

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 G'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

EPA v GHR

- GHR-brokerage
- IEM-property owner

EPA v GHR

- IEM retained GHR to be listing agent for condominiums
- Building constructed prior to 1978
- 12 units under contract with GHR as listing agent
- As agent, GHR responsible for compliance with lead paint disclosures

EPA v GHR

40 CFR § 745.107 Disclosure requirements for sellers and lessors.

(a) The following activities shall be completed before the purchaser or lessee is obligated under any contract to purchase or lease target housing that is not otherwise an exempt transaction pursuant to § 745.101. Nothing in this section implies a positive obligation on the seller or lessor to conduct any evaluation or reduction activities.

- (1) The seller or lessor shall provide the purchaser or lessee with an EPA-approved lead hazard information pamphlet. Such pamphlets include the EPA document entitled Protect Your Family From Lead in Your Home (EPA #747-K-94-001) or an equivalent pamphlet that has been approved for use in that State by EPA.
- (2) The seller or lessor shall disclose to the purchaser or lessee the presence of any known lead-based paint and/or lead-based paint hazards in the target housing being sold or leased. The seller or lessor shall also disclose any additional information available concerning the known lead-based paint and/or lead-based paint hazards, such as the basis for the determination that lead-based paint and/or lead-based paint hazards exist, the location of the lead-based paint and/or lead-based paint hazards, and the condition of the painted surfaces.

EPA v GHR

40 CFR § 745.107 Disclosure requirements for sellers and lessors.

- (3) The seller or lessor shall disclose to each agent the presence of any known lead-based paint and/or lead-based paint hazards in the target housing being sold or leased and the existence of any available records or reports pertaining to lead-based paint and/or lead-based paint hazards. The seller or lessor shall also disclose any additional information available concerning the known lead-based paint and/or lead-based paint hazards, such as the basis for the determination that lead-based paint and/or lead-based paint hazards exist, the location of the lead-based paint and/or lead-based paint hazards, and the condition of the painted surfaces.
 - (4) The seller or lessor shall provide the purchaser or lessee with any records or reports available to the seller or lessor pertaining to lead-based paint and/or lead-based paint hazards in the target housing being sold or leased. This requirement includes records or reports regarding common areas. This requirement also includes records or reports regarding other residential dwellings in multifamily target housing, provided that such information is part of an evaluation or reduction of lead-based paint and/or lead-based paint hazards in the target housing as a whole.
- (b) If any of the disclosure activities identified in paragraph (a) of this section occurs after the purchaser or lessee has provided an offer to purchase or lease the housing, the seller or lessor shall complete the required disclosure activities prior to accepting the purchaser's or lessee's offer and allow the purchaser or lessee an opportunity to review the information and possibly amend the offer.

EPA v GHR

40 CFR § 745.110 Opportunity to conduct an evaluation.

(a) Before a purchaser is obligated under any contract to purchase target housing, the seller shall permit the purchaser a 10-day period (unless the parties mutually agree, in writing, upon a different period of time) to conduct a risk assessment or inspection for the presence of lead-based paint and/or lead-based paint hazards.

(b) Notwithstanding paragraph (a) of this section, a purchaser may waive the opportunity to conduct the risk assessment or inspection by so indicating in writing.

EPA v GHR

- GHR would be liable for a violation per unit sold
- EPA charged GHR with 12 separate violations under various sections
- GHR agreed to a consent order instead of a hearing

EPA v GHR

- GHR fined \$62,000 for violations
- GHR agreed to comply with lead paint laws going forward
- EPA provided Disclosure Compliance Plan Checklist (DCPC)
- GHR must abide by DCPC
- GHR required to submit quarterly compliance reports for 1 year

EPA v GHR

- Respondent shall submit quarterly reports (hereinafter "Quarterly Reports") to EPA documenting its implementation of the DCPC for a period of one year commencing one hundred and five (105) days from the date of the Regional Administrator's signature on the Final Order.
- a) Each Quarterly Report shall be submitted by Respondent and received by EPA no later than fifteen (15) calendar days from the end of the preceding quarter.
- b) Each Quarterly report shall summarize Disclosure activities performed, state the number of Disclosures undertaken during the preceding quarter, and include copies of all checklists completed that quarter. The Quarterly Reports shall also include the following for each unit of target housing sold or leased in the relevant quarter for which Respondent acted as agent:
 - i) The complete address of any target housing (including individual unit numbers, if any) and, if not clear from the address, the type of residence (house, apartment, multi-residential building);
 - ii) The date of construction of the target housing;
 - iii) The date of sale or lease;
 - iv) The completed Lead Disclosure Form for each sale or lease;
 - v) The name of each purchaser or lessee; and
 - vi) The name and address of seller/lessor.

EPA v GHR

Whenever Respondent shall in the future act as an agent for the sale or lease of target housing, then it shall implement the Disclosure Compliance Plan Checklist ("DCPC"). The DCPC addresses the following broad categories of compliance with the Disclosure Rule and assists Respondent to:

- a) Inform the seller/lessor of its obligations under Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act and the Disclosure Rule and ensure that the seller/lessor has performed all activities required under 40 C.F.R. § § 745.107, 745.110, and 745.113 or personally ensuring compliance with § § 745.107, 745.110, and 745.113.
- b) Provide the purchaser/lessee with the EPA/HUD Fact Sheet concerning lead-based paint hazards in housing.
- c) Inform the seller/lessor (and/or its counsel) of its specific disclosure obligations under 40 C.F.R. § 745.113(a) and (b).
- d) Provide the purchaser/lessee (and/or its counsel) with a Disclosure of Information on Lead-Based Paint and/or Lead-Based Paint Hazards ("LBP Disclosure Form") for attachment to or inclusion in each sales contract or lease brokered by Respondent. Model LBP Disclosure Forms are on Pages 2-3 of the DCPC.

EPA v GHR

- e) Ensure the seller/lessor completes both Sections (a) and (b) of the LBP Disclosure Form and signed and dated the Certification of Accuracy.
- f) Ensure the seller/lessor provides Respondent with all available records and reports pertaining to lead based paint and/or lead-based paint hazards in the housing.
- g) Ensure the seller/lessor provides all available records and reports pertaining to lead-based paint and lead based paint hazards in the housing to purchaser/lessee.
- h) Ensure the purchaser/lessee is provided with the EPA pamphlet Protect Your Family from Lead in Your Home.
- i) Ensure the purchaser is provided a 10-day opportunity to conduct a risk assessment or inspection for the presence of lead; or ensure purchaser checks waiver of the opportunity.
- j) Retain a copy of the completed attachment required under 40 C.F.R. § 745.113(a) or (b) for no less than three years from date of the sale or commencement of the leasing period and comply with all other record retention requirements.

EPA v GHR

- At the time of consent order, GHR was closed
- GHR broker now assoc. broker with another brokerage
- As assoc. broker, still required to comply

R v S

- R-broker
- S-tenant
- MHP-landlord
- Action for commissions based on:
 - Breach of contract
 - Quantum meruit (unjust enrichment)

R v S

- R acted as broker in finding S a residential unit to lease from MHP
- Lease specified that:
 - "Tenant represents and warrants that it has dealt with no broker in this lease transaction other than R Licensed Real Estate Broker. Landlord agrees to pay the brokerage commission for this transaction to R. Said commission will be negotiated with R in a separate agreement."
- Separate agreement stated: "See lease for specific information concerning this transaction."

R v S

- There is no set commission for the transaction as both documents refer to each other with no mention of commission amount
- Court found that since there was no amount agreed upon, R's claim for breach of contract fails
- Court then looked at quantum meruit claim

R v S

- A court may grant any type of relief within its jurisdiction appropriate to the proof whether or not demanded, imposing such terms as may be just
- To successfully plead unjust enrichment, a plaintiff must show that:
 - (1) the other party was enriched,
 - (2) at that party's expense, and
 - (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered
- The complaint, testimony and affidavits support an unjust enrichment claim
- R demonstrated a relationship with defendants that induced R to perform services, and a benefit that MHP knew R was providing

R v S

- MHP normally paid 5% commission to brokers
- Court determined R was entitled to \$11,825 commission